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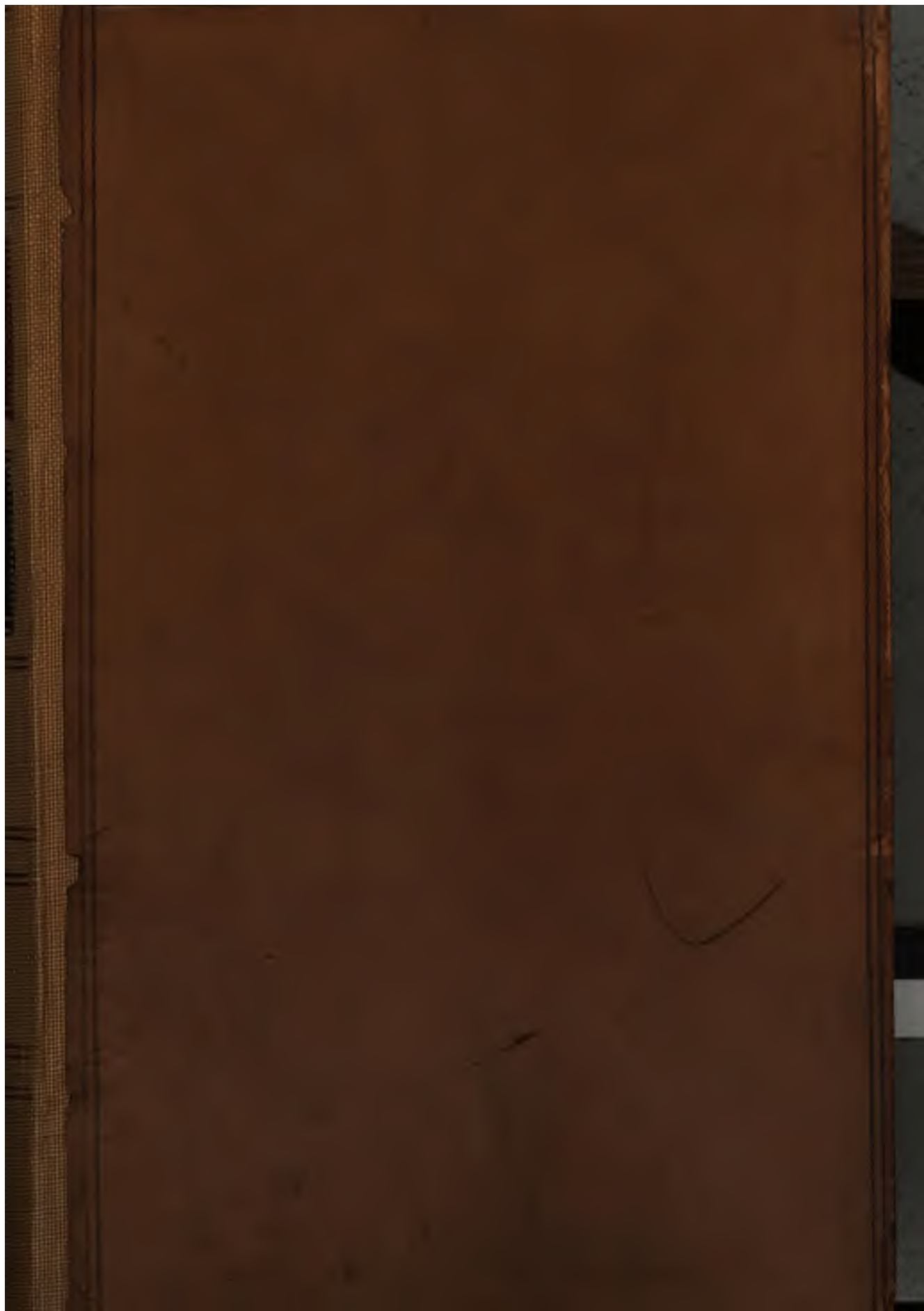
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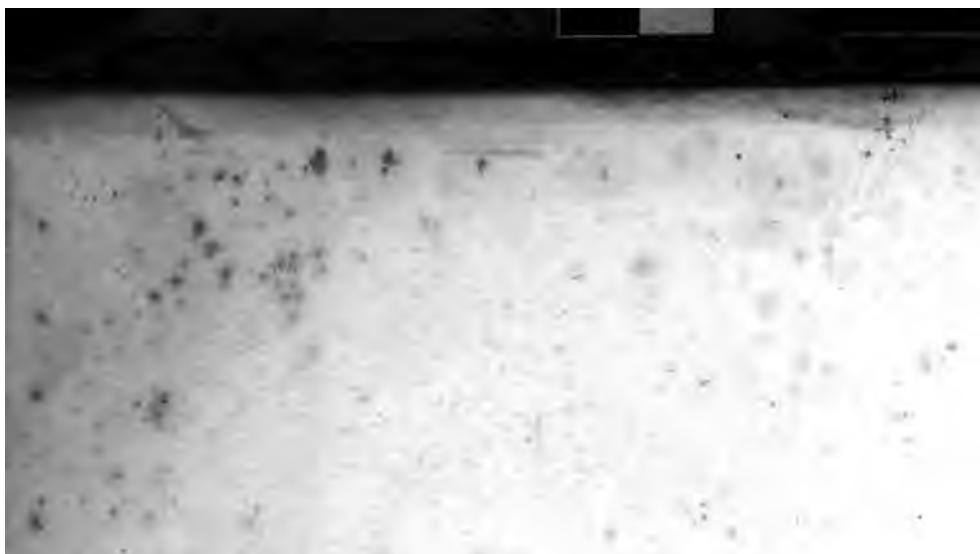
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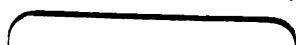
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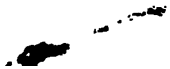
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COMMON BENCH REPORTS.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

AND

Exchequer Chamber,

IN

TRINITY AND MICHAELMAS TERMS, 1855, AND HILARY
TERM AND VACATION, 1856.

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

MICHAELMAS TERM,

IN THE

NINETEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO USUALLY SAT IN BANCO IN THIS TERM, WERE,—
JERVIS, C. J., WILLIAMS, J., CROWDER, J., AND WILLES, J.

1855.

REGULA GENERALIS.

MICHAELMAS, 1855.

The Summary Procedure on Bills of Exchange Act, 1855.
(18 & 19 Vict. c. 67.)

The following rule was made by the judges on the last day of this term :—

“The indorsements on writs under this act may be in the following form :—

“‘This writ was issued by E. F., of &c., attorney for the plaintiff;’ Or ‘by A. B., who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff’s residence*].’

Indorsements
on writs under
the “Bills of
Exchange Act,
1855.”

“‘The plaintiff claims pounds principal and interest [or ‘ pounds, balance of principal and interest’], due to him as the payee [or ‘indorsee’] of a

1855. bill of exchange [or 'promissory note'] of which the
 REG. GEN. following is a copy:—

[Here copy bill of exchange or promissory note,
 and all indorsements upon it.]

“ ‘And also shillings for noting [if noting
 has been paid], and £ for costs.

“ ‘And, if the amount thereof be paid to the plaintiff
 or his attorney within four days from the service hereof,
 further proceedings will be stayed.

“ ‘Notice.

“ ‘Take notice, that, if the defendant do not obtain
 leave from one of the judges of the courts within twelve
 days after having been served with this writ, inclusive of
 the day of such service, to appear thereto, and do not (a)
 within such time cause an appearance to be entered for
 him in the court out of which this writ issues, the
 plaintiff will be at liberty, at any time after the expira-
 tion of such twelve days, to sign final judgment for any
 sum not exceeding the sum above claimed, and the sum
 of £ for costs, and issue execution for the same.

Leave to ap-
 pear.

“ ‘Leave to appear may be obtained on an application
 at the judges' chambers, Serjeants' Inn, London, sup-
 ported by affidavit shewing that there is a defence to the
 action on the merits, or that it is reasonable that the
 defendant should be allowed to appear in the action.

“ *Indorsement to be made on the Writ after Service
 thereof.*

“ This writ was served by X. Y. on L. M. [the de-
 fendant] on Monday, the day of , 185 .
 [Signed] “ ‘X. Y.’ ”

“ N.B. No other claim than a claim on a bill of ex-
 change or promissory note is to be included in writs
 issued under the Summary Procedure on Bills of Ex-
 change Act, 1855.”

(a) The indorsement given by the schedule to the act omits
 the word “not.”

Costs under the above Act, as settled by the Masters, and approved by the Judges.

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REG. GEN.

"In pursuance of the 'Summary Procedure on Bills of Exchange Act, 1855,' we, the undersigned masters of the superior courts of common law, have fixed, subject to the approval of the judges of the said courts, the following sums for costs to be allowed in cases in which the plaintiff has signed final judgment for default of appearance, viz. :—

	£	s.	d.
<i>" Above 20l.</i>			
" Agency or country cases, including mileage	4	0	0
" Town cases	3	8	0
<i>" Under 20l.</i>			
" Agency or country cases, including mileage	3	2	0
" Town cases	2	14	0"

MAC ANDREW and Others v. THE ELECTRIC TELEGRAPH COMPANY.

Nov. 3.

THIS was an action against The Electric Telegraph Company for negligence in the transmission of a message.

The 66th section of the Electric Telegraph Company's Act, 1853,—16 & 17 Vict. c. cccii.,—enacts, "that the use of any

The first count of the declaration stated, that, before and at the time of making the agreement and promise

electric telegraph erected or formed under the provisions of the act for the purpose of receiving and sending messages shall, subject to the prior rights of use thereof for the service of Her Majesty and for the purposes of the company, and subject also to such reasonable regulations as may be from time to time made or entered into by the company, be open for the sending and receiving of messages by all persons alike without favour or preference."

The plaintiffs sent a message to the defendants' office, to be transmitted by their telegraph to a vessel lying off Exmouth, requiring the master to proceed with her to Hull. The message was received by the defendants, subject, amongst others, to the following condition,—“The company will not be responsible for mistakes in the transmission of un-repeated messages, from whatever cause they may arise.” In the transmission of the message (which was an un-repeated one), “Southampton” was by mistake substituted for “Hull,” in consequence of which the vessel went to the former place, and the plaintiffs sustained loss in the sale of the cargo (oranges) at a bad market :—

Held, that the above condition was a reasonable one within the 66th section of the act, and afforded an answer to the action.

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thereinafter mentioned, the defendants carried on the business, amongst other things, of transmitting and giving effect by means of the telegraphs and apparatus of them the defendants, and otherwise, to intelligence and messages, for certain hire and reward in that behalf; and the plaintiffs were desirous that the defendants should transmit and give effect as aforesaid to a certain message which the plaintiffs were then desirous of having transmitted from London to the master of a certain ship or vessel of the plaintiffs called the Foam, then lying off Exmouth Point, which said message was the following, that is to say, "Foam, proceed to Hull immediate;" and thereupon, and before suit, in consideration that the plaintiffs, at the request of the defendants, would pay to the defendants the sum of 10s., the defendants promised the plaintiffs that they would transmit such message to the said master: Averment, that, although the plaintiffs paid the sum of 10s. to the defendants, yet the defendants wholly neglected to and did not transmit the said message, but another and a different message, to wit, in the words following, to wit, "Foam, proceed to Southampton immediate," and thereupon the said master proceeded with the said ship to Southampton instead of to Hull, as he otherwise would have done, and there landed and discharged her cargo at Southampton, and the plaintiffs lost and were deprived of 188*l.* 18*s.* 10*d.*, which they would have gained had the said ship proceeded to Hull, over and above what her cargo realized when discharged at Southampton, and were put to further expenses, to wit, 46*l.* 1*s.* 4*d.*, by reason of the defendants' having so made default as aforesaid.

There were also counts for money paid, money had and received, and money found due upon an account stated.

The defendants pleaded,—first, that they did not pro-

mise as alleged,—secondly, as to the first count, that they made the promise therein mentioned under and subject to a certain condition, that is to say, that the defendants would not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they might arise; that the message in the first count mentioned was an unrepeatd message; and that the substitution of the word “Southampton” for the word “Hull” in the said message as delivered, was and arose from a mistake within the meaning of the said condition,—thirdly, as to the residue of the declaration, except as to 10s., parcel of the moneys therein mentioned, never indebted,—fourthly, payment into court of 10s.

The plaintiffs joined issue upon the first and third pleas; and, as to the second plea, they took issue thereon, and also replied that the said promise and condition therein mentioned were respectively made after the passing and coming into operation of “The Electric Telegraph Company’s Act, 1853,” and related to and were for the use of an electric telegraph erected under the provisions of the said act for the purpose of sending a message under the said act for the sending whereof the use of the said electric telegraph was open to the plaintiffs according to the said act, subject to the prior rights of use thereof for the service of Her Majesty and for the purposes of the said company; that the said company had at all times refused to transmit repeated messages without extra reward in that behalf; and that the said condition and refusal were and are regulations made by the said company for the use of the said telegraph, and to which the use thereof was and is subject, and were not nor are reasonable regulations within the meaning of the said act in that behalf. Issue thereon.

The cause was tried before Jervis, C. J., at the sit-

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tings at Guildhall after Trinity Term last. It appeared that the plaintiffs, who were merchants carrying on business at Liverpool and also in London under the firm of Mac Andrew & Co., in the autumn of last year, chartered a vessel called "The Foam," to proceed to St. Michael's for a cargo of oranges, and thence to a port in the united kingdom, according to orders the master might receive from the agents of the charterers when she should be loaded. The vessel being loaded, the plaintiffs' agents at St. Michael's directed the master to proceed to Hull; but at the same time told him, that, on sighting any land in the English Channel, he might send up to London for orders direct from the plaintiffs, as the lapse of a few days sometimes makes a material difference in the market value of a cargo of so perishable a nature.

Having accordingly received intelligence of the arrival of The Foam off Exmouth, the plaintiffs, on the 13th of December, sent a clerk to the central office of The Electric Telegraph Company, in Lothbury, for the purpose of transmitting a message to the master, desiring him to proceed with her to Hull. The request to the company to transmit the message was contained in a printed form, as follows,—the written parts being represented by italics:—

" The Electric Telegraph Company.
 " Central Station, Founders' Court, Lothbury,
 Bank of England.

			£	s.	d.
Prefix 118.	Code time, <i>M. G.</i> , No. of words, 20.	Message	0	5	0
Received, 2:33	{	Date, 13, 12, 1854	Repeating	.	.
Finished, 2:41		Sent to <i>B. S.</i> station	Reply	.	.
		by me, <i>J. N. Green</i> , clerk.	Porterage	0	5
			To be paid out	.	.
			Total	0	10 0

" (All numbers must be written at length in words.)

" Please send the following message according to the conditions indorsed hereon,

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" From *M'Andrew & Co., London*

" To *R Redway, owner of Foam, The Point, Exmouth.*

" *Foam, proceed immediate to Hull.*

" *M. M. South Devon Telegraph from Ex. P^d.*

" *57, Lothbury. J. D.*

" Signature. *R. M'Andrew & Co.*

" Address. *All Hallows Chambers.*

" Before signing, please to see that the amount to be charged for the message is correctly entered above, and on the receipt; and read the indorsed conditions.

" The company will not be answerable for errors caused by indistinct writing."

The indorsement upon the document was as follows:—

" The Electric Telegraph Company.

" Conditions as to uninsured messages.

" The public are informed, that, in order to provide against mistakes in the transmission of messages by the electric telegraph, every message of consequence ought to be repeated by being sent back from the station at which it is to be received, to the station from which it is originally sent. Half the usual price for transmission will be charged for repeating the message. The company will not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they may arise: nor will the company be responsible for mistakes in the transmission of a repeated message, nor for delay in transmission or delivery, nor for non-transmission or non-delivery of any message, whether repeated or unrepeatd, to any extent above 5*l.*, unless it be insured.

" Correctness in the transmission of messages can be

1855.	insured at the following rates in addition to the us			
MAC ANDREW	charge for repetition :—	£	s.	d.
v.	“ For any sum up to 100l.	1	0	(
THE ELECTRIC	“ Above 100l. to 200l.	2	0	(
TELEGRAPH	200l. to 300l.	3	0	(
COMPANY.	300l. to 400l.	4	0	(
	400l. to 500l.	5	0	(
	500l. to 600l.	6	0	(
	600l. to 700l.	7	0	(
	700l. to 800l.	8	0	(
	800l. to 900l.	9	0	(
	900l. to 1000l.	10	0	(

and 20s. for every 100l. or fraction of 100l. above the sum : and the company will not be responsible for any amount beyond the sum for which the message insured and the rates paid. The company will not be responsible in any case for delays arising from interruptions in the working of their telegraphs.

“ Notice. Messages to be sent to any places beyond the extent of the company’s lines or stations, will be delivered by the company’s officers at their terminal station mentioned in the subjoined request, to the parties as may have charge of the further means of conveyance ; but it is expressly provided that the company are in no case to be held responsible for the transmission or delivery of the message beyond the terminal station in such request mentioned.

“ Request.

“ I request that this message may be forwarded to the company’s office at *Exeter* (being the terminal station of the company) by *South Devon Telegraph* at the address mentioned therein, subject to the above conditions, and have deposited 5s. to be applied towards the purpose. (Signed) “ *R. M. Andrew*

The message in question was an “ unrepeated message ;” and, in its transmission by the company

consequence of the similarity of the characters representing the two words,—the communication being by means of the *printing telegraph*, in cypher,—“Southampton” was by mistake read by the clerk at the terminal station instead of “Hull;” and the result was, that, instead of going to Hull, which is one of the principal provincial markets for oranges, the Foam went to Southampton, and a loss was sustained on the sale of the cargo of 235*l*.

It was submitted, on the part of the defendants, that the printed conditions upon which the message in question was transmitted, exonerated them from liability for the mistake, the message not having been repeated.

For the plaintiffs it was insisted, that the company were only empowered by the 66th section of their act, 16 & 17 Vict. c. cciii, to impose such conditions as were reasonable; and that a condition exonerating them from gross negligence,—which it was contended this was—was unreasonable, and therefore bad. (*a*)

The Lord Chief Justice ruled, that the condition in question afforded a defence on the general issue; and that, at all events, the defendants were entitled to succeed upon the question raised by the second replication to the second plea: and accordingly he nonsuited the plaintiffs, reserving leave to them to move to enter a verdict for a sum to be ascertained, by an orange-merchant, if the court should be of opinion that the condition in question was unreasonable.

Byles, Serjt. (with whom was *Lush*), moved accordingly. The acts of parliament by which this company are incorporated, and by which their powers are ex-

(*a*) An application was made at the trial for leave to amend the declaration, by substituting for the first count a count charging the defendants with gross negligence, but the Lord

Chief Justice refused to allow it. It was also proposed to amend, by setting out the *whole* condition; but that was abandoned.

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tended,—9 & 10 Vict. c. xlv, 14 & 15 Vict. c. lxxxvi, and 16 & 17 Vict. c. cciii,—give them certain rights and privileges, but subject to the rights to be enjoyed by the public. The 66th section of the last-mentioned act, which enables them to make regulations as to the mode of working their telegraphs, enacts “that the use of any telegraph erected or formed under the provisions of this act for the purpose of receiving and sending messages, shall, subject to the prior rights of use thereof for the service of Her Majesty, and for the purposes of the company, *and subject also to such reasonable regulations as may be from time to time made or entered into by the company*, be open for the sending and receiving of messages by all persons alike, without favour or preference.” It is compulsory on the company to receive and to transmit messages, subject to reasonable regulations. The only question, therefore, is, whether this is a reasonable one: and that is a question of law. It is submitted that this condition is unreasonable. The company are bound to transmit all messages for the public. They stand in the same position in this respect as carriers, who are bound to carry for reasonable compensation all goods tendered to them; or innkeepers, who are bound to provide accommodation for all such guests as may present themselves; or millers, who have by custom a right to the grinding of the corn of the tenants of a manor, and upon whom is cast a corresponding obligation to grind all corn that may be brought to them for that purpose. The company have no right to say that they will not hold themselves responsible for any mistakes which may be the result of negligence on the part of their servants, unless insurance is paid. Even the repetition of the message under these conditions would be useless, unless insurance were paid. A condition which excludes the possibility of redress under any circumstances, cannot be reasonable. [*Jervis*, C. J. May not a carrier

limit his responsibility by notice or special contract? Crowder, J., referred to *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 353, and *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, antè, Vol. X, p. 454.] The latest case upon the subject is, *Hearn v. The London and South Western Railway Company*, 9 Exch. 793: but, notwithstanding a carrier may limit his responsibility, he is still liable for gross negligence. (a) [*Jervis*, C. J. It was not suggested that this was a case of gross negligence: the only question was, whether the condition was legal and reasonable.] A mistake not the result of gross negligence might not make the company liable. But here there is a specific issue raised upon the reasonableness of the condition. In *Garnett v. Willan*, 5 B. & Ald. 53, 56, Bayley, J., says: "A carrier is entitled to have a compensation in proportion to the value of the articles entrusted to his care, and the consequent risk which he runs. He may, therefore, by a special notice, limit his responsibility to a reasonable extent." A carrier could not, for instance, be permitted to say that he would not be responsible for the delivery of goods within a month. Independently of the act, therefore, this company could only impose conditions of a reasonable character: and the question is, whether it is reasonable that they should limit their responsibility to the accuracy of insured messages only. [*Jervis*, C. J. The only question is, whether the condition is reasonable so far as it regards the non-liability in respect of mistakes in the transmission of unrepeatèd messages.] The declaration alleges an absolute engagement on the part of the company to transmit the message correctly; and,—according to the doctrine of *Ross*

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(a) See the observations of Cresswell, J., in giving judgment in *Austin v. The Manchester, Sheffield, and Lincoln-*

shire Railway Company, antè, Vol. X, p. 475, upon the subject of gross negligence.

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not that part of the condition upon which the defence in this case rests is reasonable within the 66th section of the act,—viz. “The company will not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they may arise.” So far from that being, as my Brother Byles suggests, an unreasonable qualification or limitation of the company’s liability, it seems to me to be perfectly just and reasonable that means should be afforded to the company of ascertaining by repetition the correctness of the translation of the messages delivered to them for transmission. The ground upon which it is suggested that this condition is unreasonable, is, that it goes on to negative the liability of the company for mistakes in *repeated messages*, unless they be insured; and it is argued that it would be impossible in many cases to estimate the probable loss or damage to be insured against. If, however, there be any weight in that argument, it would operate to the exclusion of all contracts of insurance; and the result would be, that the company would be left without the means of protecting themselves in any case against those risks which are necessarily incident to the business which they carry on, and would become, what it is not pretended that they are, general insurers against loss arising from casualties over which they have no control. The difficulty, or, it may be, the impossibility, of estimating accurately the risk to be incurred, is an infirmity necessarily incident to the nature of the subject matter of the contract. I see no reason, therefore, why the company should not be allowed to avail themselves of the same sort of protection that other persons in a similar position are by law entitled to do, by limiting their liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with them. For these reasons, I am of opinion that the nonsuit ought not to be disturbed.

CROWDER, J. (a) I am of the same opinion. By the 66th section of the 16 & 17 Vict. c. cciii, it is enacted "that the use of any electric telegraph erected or formed under the provisions of the act, for the purpose of receiving and sending messages, shall, subject to the prior rights of use thereof for the service of Her Majesty, and for the purposes of the company, and subject also to such *reasonable regulations* as may be from time to time made or entered into by the company, be open for the sending and receiving of messages by all persons alike, without favour or preference." The question is, whether the regulation or condition relied on by the second plea is a reasonable one within that section. In the conclusion I have arrived at, I confine myself entirely to that part of the regulation which is in question here, without reference to the rest of what appears upon the back of the contract, as to which there may be some doubt. The simple question upon the present occasion I take to be, whether the condition which declares the company not to be responsible for mistakes in the transmission of *unrepeated messages*, from whatever cause they may arise, is reasonable or not. By their notice, the company inform the public, that, "in order to provide against mistakes in the transmission of messages by the electric telegraph, every message of consequence ought to be repeated, by being sent back from the station at which it is to be received, to the station from which it is originally sent;" and that "half the usual price for transmission will be charged for repeating the message." Then comes the condition upon which the question arises,—"The company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise." The public have thus the opportunity of transmitting unimportant messages

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(a) Williams, J., was absent.

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for a small charge ; or, if it be a matter of importance, they may, at a moderate additional charge, have the message repeated, and so obtain a certainty almost of its being transmitted with perfect accuracy. I see nothing unreasonable in that. Whether the subsequent limitations are reasonable or not, I do not stop to consider : that question is not now before us. This was the case of an unrepeatd message, in the transmission of which one word has been by mistake substituted for another. That, as it seems to me, is clearly a mistake within the regulation or condition in question ; and that regulation not being in my opinion an unreasonable one, I concur with my Lord Chief Justice in thinking that the nonsuit in this case ought not to be set aside.

WILLES, J. I also am of opinion that the nonsuit was right. It seems to me to be immaterial to consider whether or not the word "regulations" in the 66th section of this act of parliament was intended to include such a condition as this in the contracts between the company and those for whom they may transmit messages ; because, supposing it does, it would be reasonable for the company to do what a party, if he had the sending of a message for himself by the telegraph, would have done, and to charge for it. For instance, if a man wanted to send a message by the telegraph, which it was important to him should be correctly transmitted, he would naturally repeat it, in order to insure its correctness. Now, the repetition of a message necessarily imposes more labour upon the party sending it, and therefore it is but reasonable that that extra labour should be paid for. And it is also reasonable that the company should be paid more for taking upon themselves the risk of insuring the transmission against those accidents which are necessarily incident to a business of this sort. I think it is obviously reasonable that a man who requires the

company to take upon themselves either a greater amount of labour or a greater amount of risk, should pay them accordingly. It is not suggested here that the difference of charge between the repeated and the un-repeated message, or between the uninsured and the insured message, is greater than fairly represents the difference of labour or of risk. And, supposing the word "regulations" in the act of parliament does not extend to the business of the company as bailees, then, so far as they are bailees, their contracts are regulated by the common law: and, so far back as the year 1803, in a case of *Izett v. Mountain*, 4 East, 371, it was considered to be so clear that counsel (Erskine and Marryat) declined to argue against the proposition that a carrier, upon whom the liability of an insurer is imposed by the common law, might by a notice equivalent to the condition in the present case, protect himself from that liability. If such a limitation as this might have been imposed upon the contract by the common law, it seems to me to be clear that there is nothing in the statute to prevent the company from so limiting the contracts between themselves and the parties who employ them.

Rule refused.

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Nov. 5.

The court allowed the certificate of an acknowledgment of a deed by a married woman, taken at Chippawa, in Upper Canada, under the 3 & 4 W. 4, c. 74, to be received and filed; although the affidavit of verification omitted to state the place where the acknowledgment was taken,—there being sufficient on the face of the documents to satisfy them that the commission had been *bonâ fide* executed beyond the seas.

In re MARY, the Wife of WILLIAM PARTRIDGE.

BY order of Williams, J., bearing date the 16th of June last, Oliver Thomas Macklem, manufacturer, Richard Kirkpatrick, merchant, John Rousseau, merchant, John Wilkinson, town-clerk, John Phillips, butcher, and John Hulme, baker, all of Chippawa, near Niagara Falls, in Upper Canada, or any two of them, were appointed special commissioners to take the acknowledgment of Mary, the wife of William Phillips, boiler-maker, residing at Chippawa, of a deed to pass her separate estate, pursuant to the statute 3 & 4 W. 4, c. 74.

The acknowledgment was taken on the 18th of September, before John Hulme and John Phillips, two of the commissioners: but the affidavit, which was made by Hulme, omitted to state the place where the acknowledgment was taken. The jurat, however, was as follows:—"Sworn at Chippawa, in the county of Welland, this 18th day of September, 1855, before me, James Cummings, one of Her Majesty's justices of the peace for the united counties of Lincoln and Welland, and a commissioner for taking affidavits authorised by the law of Upper Canada." The notarial certificate made on the same day, and at the same place, stated that the affidavit was duly sworn by John Hulme at that place, before James Cummings, and that Cummings was a justice of the peace, and a commissioner for taking affidavits at Chippawa.

The registrar having objected to receive and file the certificate and other documents, on the ground that the affidavit of verification varied from the form prescribed by the rule of court of Hilary Term, 1834,

J. Addison moved that he might be directed to receive and file them. He submitted that the omission to mention the place where the acknowledgment was taken was not material, inasmuch as the mention of the place was not expressly required by the statute, but only by the rule of court; and that, inasmuch as the jurat shewed the affidavit to have been sworn at Chippawa, where all the parties resided, the inference was strong that the acknowledgment was taken there also. He referred to *Ex parte Elizabeth Legge*, antè, Vol. XV, p. 364, where a commission was allowed to go out to Australia with a blank for the Christian name of the husband, which (the marriage having taken place there) was unknown here; and to *In re Mary Bingle*, antè, Vol. XV, p. 449, where the court allowed an acknowledgment and affidavit (taken in New South Wales) to be filed, notwithstanding an erasure in a material part of the affidavit, there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn.

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JERVIS, C. J. I find a case of *In re Shufflebottom*, 6 Scott, 898, where a similar objection was taken, and overruled. There, the acknowledgment was taken at Philadelphia, but the affidavit of verification omitted to state that fact. Wilde, Serjt., submitted that the statute no where required the affidavit to state where the acknowledgment was taken, and that, if it did, it was sufficiently shewn, the affidavit appearing to have been sworn at Philadelphia; and he suggested that the rule was intended only to apply to England, where the commissioners are appointed to act for certain districts, and it would be material to shew that the acknowledgment was taken before the proper commissioners. And Tindal, C. J., in giving judgment, says,—“There seems to be good sense in the distinction suggested. In this country, it is ne-

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cessary that it should be made to appear that the acknowledgment was taken before commissioners duly authorised to act in the place where it is taken. But the same reasons do not apply in the case of an acknowledgment taken abroad." It may, however, be that the recent statute, 17 & 18 Vict. c. 75, has made some difference in this respect. We will, therefore, look into it before we give our opinion.

Cur. adv. vult.

JERVIS, C. J., now delivered the opinion of the court.

In this case, moved by Mr. Addison on the first day of term, we are of opinion that the certificate of the acknowledgment of Mary Partridge, a married woman, ought to be received and filed. The commission under which it was taken, was issued by a judge of this court pursuant to the 3 & 4 W. 4, c. 74, s. 83, in consequence of the residence of the married woman beyond seas, at Chippawa, near Niagara Falls, in Upper Canada; and it was directed to six commissioners there, or any two of them. Two of the commissioners took the acknowledgment, and gave their certificate of that fact in the form required by the 3 & 4 W. 4, c. 74, s. 84, which form does not state where the acknowledgment was taken.

The affidavit verifying the certificate of the acknowledgment satisfies the requirements of the 85th section; but it omits to state where the acknowledgment was taken; and in this respect it varies from the form prescribed by the rule of court of Hilary Term, 1834, made under the 89th section.

It appears to us that this omission is not in the present case a fatal objection, because there is enough to satisfy us that the act has been complied with; and where that is the case, inasmuch as the rule of Hilary Term, 1834, is not a statutory one, and the object which

alone it could have been intended to answer, has been attained, we may, both upon the reason of the thing, and upon the authority of the case *In re Shufflebottom*, 6 Scott, 898, dispense with a strict adherence to its directions.

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We do so in the present case, because the affidavit of verification,—which is itself duly certified by a notary public,—appears to have been sworn upon the same day upon which the acknowledgment was taken, and it was sworn before a magistrate at Chippawa, being the same place of which all the commissioners are described in the commission, and of which the commissioners before whom the acknowledgment was made are described in the affidavit of verification made by one of them. These circumstances are enough to satisfy us that the commission has been really and bonâ fide acted upon beyond seas, for the purpose for which it was issued: and, as none of the requisites of the statute itself are wanting, the certificate and other documents may be received and filed.

Rule accordingly.

FLETCHER and Others v. TAYLEUR.

Nov. 2.

THIS was an action to recover damages for the breach of a contract for the building of a ship.

In an action for the non-completion of a ship pursuant to a contract, the jury having given by way of damages the difference between the net freight which

The declaration stated, that, before the commencement of this suit, it was agreed between the plaintiffs and defendant, that the defendant should build for the plaintiffs a new iron ship of the same size and dimen-

the vessel probably would have earned had she been ready at the time stipulated, and the amount actually earned by her when delivered some months later, when freights in the particular trade were lower. No question having been raised at the trial as to the principle upon which the damages ought to have been assessed,—the court refused to disturb their verdict.

Quære, as to the proper mode of estimating damages for the breach of a contract for the delivery of a chattel?

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sions and model as the second iron ship then in course of construction for Messrs. C. Moore & Co., and contracted for on the 17th of March then last past, and in accordance with a certain specification then agreed on, and should deliver the said ship to the plaintiffs, at the latest, by the 1st of August, 1854, and that the plaintiffs should pay to the defendant for the said ship the sum of 14,642*l.* 17*s.* 6*d.*, less 2½ for the hundred, in the following payments, that is to say,—one eighth, when stem and stern-post up,—one eighth, when framed,—one fourth, when plated up to gunwale, and beams secured,—one fourth, when all decks are laid, and poop, &c. plated and rivetted,—and one fourth, when completely finished and delivered: Breach, that, although the plaintiffs made all payments, and performed all things on their part by the said agreement to be performed, yet the defendant did not deliver the said ship to the plaintiffs finished according to the contract and specification, nor did he deliver the same until long after the 1st of August, 1854; whereby the plaintiffs were deprived of and lost great profits and gains which would otherwise have accrued to them from the use of the said ship, and also from the employment of her in the Australian trade, in which trade it was intended by the plaintiffs she should be employed, and of which the defendant before and at the time of making the said agreement had notice: And the plaintiffs sued the defendant for money had and received by the defendant for the use of the plaintiffs, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

The defendant pleaded, amongst other pleas, a denial of the contract alleged in the declaration.

The cause was tried before Crowder, J., at the last assizes at Liverpool. The facts which appeared in evidence were as follows:—The plaintiffs were ship-owners at Liverpool. The defendant was an iron ship builder

carrying on business at Warrington under the style of "The Bank Quay Foundry Company;" and the action was brought to recover damages for the non-delivery of an iron ship, to be called "The Startled Fawn," which the defendant had undertaken to build for the plaintiffs, under the following contract:—

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"Hull, mast, and spar contract.

"Messrs. The Bank Quay Foundry Company, of Warrington, hereby contract with Messrs. Partridge, Fletcher, & Co., of Liverpool, to build a new iron ship of the same size, dimensions, and model, and according to the same specification, and subject to all the same conditions, as the second iron ship contracted for by the said Bank Quay Foundry Company with Charles Moore & Co., and dated 17th March, 1853, excepting the larboard strake to be only $\frac{3}{4}$ th inch, instead of $\frac{1}{2}$ inch; but all the other plate the same.

"The dimensions of the above ship are, &c.

"The price to be 14,642*l.* 17*s.* 6*d.*, less a discount of 2 $\frac{1}{2}$ per cent. Payments,—one eighth, when stem and stern-post up,—one eighth, when framed,—one quarter, when plated up to gunwale, and beams secured,—one quarter when all decks are laid, and poop, &c. plated and rivetted,—and one quarter, when completely finished and delivered.

"The masts to be either built of iron, with mid-feather right up, of such diameter as purchasers may desire, or to be substantially built of pitch-pine, at their option.

"The tanks to hold 5000 gallons, in place of 4500 gallons.

"The ship to be completely delivered at the latest by the 1st day of August, 1854.

"This contract is subject to a condition, that, in case any accident happens to the ship 'Tayleur,' in launching or bringing down the river, so as to prevent the Bank Quay Foundry Company from building vessels of

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this size at their works at Warrington, then this contract to be null and void.

“Dated at Liverpool this 3rd day of September, 1853.”

A detailed specification was on the 13th of November signed by the plaintiffs and by one Charles Heathcote, the manager of The Bank Quay Foundry Company, on behalf of the defendant. The specification contained the following provisions :—

“The ship to be built under the superintendence and direction of Mr. Grindrod, and his views to be fully carried out in all respects ; and any alterations he may consider an improvement on this specification, to be done without any extra charge, provided it does not cost more ; and the work and materials to be subject to the approval of the purchasers.

“The ship to be built of the very best Staffordshire iron ; and such parts as Mr. Grindrod may point out, to be made of best scrap or Low Moor iron, either of which he may demand ; and anything objected to by him to be immediately exchanged.”

The vessel was intended by the plaintiffs,—and, from the nature of her fittings, the defendant must have known the fact,—for a passenger ship in the Australian trade.

On the 28th of March, 1854, the defendant addressed the following letter to the plaintiffs :—

“We are making every exertion to push on the work for your vessel. We had intended to have laid her down on the blocks of Messrs. Moore’s ship ‘The Golden Vale,’ when launched : but we have been unfortunately so much delayed with her, that, were we to wait until she is launched, your ship would be kept back much too long ; and we have therefore determined to lay her down at once. The unforeseen circumstances which have delayed ‘The Golden Vale’ will, we much fear, cause some delay in the delivery of your ship. This we should much

regret on every account ; and you may rely on our doing all we can to expedite it. *If you could extend the time of delivery, say two months, thus giving us seven months from this time, you would be conferring a great favour on us.* We shall be glad to hear from you on this."

To this the plaintiffs replied on the 29th, as follows :—

"We have received your letter of yesterday, and are glad to learn that you have now arranged to lay down our new ship forthwith ; for, we cannot sufficiently impress upon you how important it is to us that no time should be lost, as, in the present uncertain state of affairs, we may look for a serious depreciation in the value of ships, at any time.

"As regards an extension of time for two months beyond that stipulated for, we should be glad to hear whether, if we consented to it, you would limit yourselves to the end of September, under a demurrage of so much each day, as really from that time days would be shortening so fast that we should be seriously inconvenienced and prejudiced in fitting the vessel out.

"We trust you will see the necessity of employing as many men as possible to push the work forward."

On the 30th the defendant wrote to the plaintiffs as follows :—

"We are obliged for your letter of the 29th instant ; and, in reference to the delivery of your vessel, you will observe we ask for seven months from present time, under the impression that we had five months ; and are sorry that we cannot expect to be ready in less than the time asked for. We must decline undertaking any liability as to demurrage, on the same grounds that we refused at the time the contract was made. But our going to the expense of laying down an extra pair of ways must be the best assurance of our endeavours to meet your wishes."

The vessel not being in so forward a state as she

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should have been, the plaintiffs towards the end of July wrote to the defendant intimating that they would hold him responsible for any damage they might sustain from her non-completion by the time stipulated in the contract.

The vessel was not delivered to the plaintiffs until March, 1855.

There was evidence to shew that freights to Australia were very high in the months of July, August, and September, 1854; but that, in October, they began to decline, and continued low until May, 1855, when the ship sailed. The witnesses called on the part of the plaintiffs stated that the vessel would in all probability have obtained, if completed by the time mentioned in the contract, at the then current rates, an outward freight of about 7000*l.*, and a gross freight home of about 9500*l.*, and that, allowing for the necessary outlay and expenses, the profit would in all probability have been a sum somewhat exceeding 7000*l.* The amount of freight received by the plaintiffs, when the ship sailed, in May, 1855, was 4280*l.*

The payments, it appeared, had not been made by the plaintiffs at the times stipulated for by the contract,—3600*l.* only having been paid by the 1st of August, 1854, and 6800*l.* only up to March, 1855, and the residue in April.

Summing up.

In leaving the case to the jury, the learned judge, without any objection on the part of the counsel on either side, left the question of damages to them in the following terms:—"In order that you may be under no mistake as to the principle on which you are to calculate the damages, I will state to you, as it has been laid down before, (*a*) and indeed as both the counsel have agreed upon, that, where two parties have made a contract, which one of

(*a*) Referring to the case of *Hadley v. Baxendale*, 9 Exch. 341, which had been cited.

them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The jury returned a verdict for the plaintiffs, damages 2750*l*.

Hugh Hill now moved for a new trial, on the ground that the damages were excessive. The jury have evidently estimated the damages upon an erroneous and mistaken principle. They have given the plaintiffs the difference between what it might be presumed the vessel would have earned if she had been ready to proceed to Australia at the time she ought by the terms of the contract to have been completed, when freights were high, and the amount actually earned by her when she did sail: whereas, it is manifest from the plaintiffs' letter of the 29th of March, 1854, that they were willing to extend the time for the completion of the vessel until the end of September, if the defendant would have consented to the condition as to demurrage after that date; and therefore, if the vessel had been delivered by the 1st of October, 1854, the jury clearly would not have been justified in giving the amount of damages they have given; and yet the data on which they have proceeded existed as much on that day as at the time of her actual delivery. [*Jervis*, C. J. It would be extremely convenient if there were some general rule as to the measure of damages applicable to all cases of breach of contract, rather than that the matter should be left at large. May it not be that the breach of a mercantile

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contract may be susceptible of estimation according to the average per-centage of mercantile profits? Is not that to some extent the result of *Hadley v. Baxendale*?] In that view, it might be material to bear in mind the periods at which the instalments of the purchase-money for this vessel were paid. More than half the amount was actually in the plaintiffs' hands at the time she was completed and delivered to them. [Crowder, J. In *Alder v. Keighley*, 16 M. & W. 117, the court of Exchequer lay it down as a clear rule, "that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." I cannot say that the damages in this case have been calculated on a false principle. The jury properly took into their consideration the fact that vessels in the Australian trade were very much in request at the time this vessel should have been completed.] The verdict is for a very large amount, and it is at least extremely doubtful whether the jury have not been misled by the evidence as to the probable profits of such a voyage as that contemplated.

JERVIS, C. J. I think there ought to be no rule in this case. The amount of the verdict clearly can be no ground for our interference: that must in all cases depend upon the magnitude of the claim. The question was entirely and properly left to the jury, both parties having agreed that the question for their consideration was, what was the loss in fact sustained by the ship's not having been delivered by the stipulated day. The other point was not suggested,—perhaps because it is an erroneous view,—and therefore we are not now called upon to decide it.

CROWDER, J. (a) I am of the same opinion. The question as to the amount and the mode of estimating

(a) *Williams, J.*, was absent.

the damages was very fully gone into. The evidence upon the subject was that of mercantile men, peculiarly conversant with the matter : and the jury was a special jury of Liverpool merchants, than whom none could be more fit to decide such a question. And I must say that I do not consider the amount excessive.

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WILLES, J. I am of the same opinion, though I am not prepared to say that the view suggested by my Lord, in the course of the argument, is erroneous. It certainly is very desirable that these matters should be based upon certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. No matter what the amount of inconvenience sustained by the plaintiff, in the case of non-payment of money, the measure of damages, is, the interest of the money only : and it might be a convenient rule, if, as suggested by my Lord, the measure of damages in such a case as this was held by analogy to be the average profit made by the use of such a chattel. That question, however, was not made at the trial. Both parties seem to have agreed that the amount of damages was purely a question for the jury. Evidence was given of the difference of the value of the voyage at the time the vessel ought to have been delivered to the plaintiffs, and at the time when she was actually delivered : and no evidence was offered on the part of the defendant to shew that this was at all exaggerated. And, indeed, if the damages ought to have been computed according to the principle suggested, it seems to me that no injustice has been done ; for, the sum the jury have given is not in that point of view extravagantly large. I therefore think there is no ground for our interference.

Rule refused.

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UPTON v. TOWNEND.

UPTON v. GREENLEES.

Nov. 9.

A., demised, under separate leases, two separate tenements to B., with a covenant on the part of A. to insure the premises, and to rebuild in the event of their destruction by fire. B. demised one of the tenements to C., and the other to D.; and during their respective tenancies the whole premises were destroyed by fire. The premises were afterwards rebuilt by A., pursuant to a new plan submitted to B., and approved of and signed by him. B., before the re-building, agreed to surrender the premises, and take a new lease of them in their altered state, which he afterwards did. The new buildings varied from the old ones, inasmuch as the area of C.'s premises was thereby decreased, and that of D.'s increased. A. was not entitled to recover against C. and D., as for use and occupation after the period at which the re-building had arrived at such a stage as to alter the character of the respective premises,—the alterations in the premises amounting to an eviction, to which he was a party.

BY the indorsement on the writ of summons in first-mentioned action, of *Upton v. Townend*, the plaintiff claimed as follows:—

	£	s.
"1854, June 24, half-year's rent to this day, of warehouse on the ground floor and basement of house, No. 5, Bread Street, Cheapside, in the City of London	115	0
"1854, June 24, half-year's rent to this day, of warehouse on the first floor of the same house	30	0
	£145	0

The declaration was for money payable for use and occupation of a messuage and rooms, and on account of the same. The defendant pleaded, as to 72*l.* 10*s.* p. the money claimed, payment into court of the same, and, as to the residue of the claim, a denial of the same.

The plaintiff accepted the payment in satisfaction, and joined issue as to the residue of the claim.

The cause came on for trial before Jervis, C. at the sittings in London after Michaelmas Term 1836. The verdict was found for the plaintiff, damages 40*s.*, subject to the opinion of the court as to costs. The following case:—

On the 1st of December, 1836, the Gold

pany, of London, being in their corporate character seised in fee-simple in possession of the tenements hereinafter mentioned, by indenture of that date, sealed with their corporate seal, and also executed by the plaintiff, demised to the plaintiff, for twenty-one years from the 25th of March, 1836, the house and premises, No. 5, Bread Street, London, subject to the annual rent of 270*l.* 12*s.* 6*d.*, payable quarterly, on the usual days, and to the payment to the company on the 25th of March in each year, of the sum which the company should have paid, or be bound to pay, for insurance of the premises from loss or damage by fire. That indenture contained covenants on the part of the plaintiff, so to pay the said rent and sum for insurance, without any deduction, and to repair, casualties by fire excepted; and, on the part of the company, to effect, and during the said term to keep in force, an insurance to the amount of 2500*l.* of the demised messuage and premises from loss or damage by fire; and that, in the event of such loss or damage happening, the sums payable in respect thereof under such insurance should with all convenient speed be applied towards the rebuilding and repairing the said demised premises, or such part thereof as should be damaged or destroyed by fire.

Under this demise the plaintiff entered, and held possession of the house and premises thereby demised.

On the 30th of May, 1846, the plaintiff, by indenture of that date, executed by him and the defendant respectively, demised to the defendant, for seven years from the 25th of March, 1846, "All those warehouses then or lately in the occupation of Mr. Load, on the ground floor and basement of the before-mentioned house, No. 5, Bread Street, London, subject to an annual rent of 230*l.*, payable quarterly, on the 24th of June, the 29th of September, the 25th of December, and the 25th

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UPTON

v.

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Demise of
Dec. 1, 1836,
by the Gold-
smiths' Com-
pany to the
plaintiff.

Demise by
plaintiff to de-
fendant, May
30, 1846.

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of March,—the first quarterly payment to be made on the 24th of June, 1846.”

That indenture contained covenants on the part of the defendant so to pay that rent, to repair, and yield up the premises at the end of the term in good repair and condition, reasonable use and wear thereof and damage by fire only excepted; and also covenants on the part of the plaintiff, with the defendant, that the defendant, paying the rent and performing the covenants, should peaceably and quietly hold and enjoy the premises thereby demised for the term thereby granted, without any interruption, eviction, molestation, or disturbance of or by the plaintiff, or the said Goldsmiths' Company, or other the superior landlord or landlords of the premises, their successors or assigns, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them; and also that he, the plaintiff, would, if required so to do by notice in writing signed by the defendant, six months before the expiration of the term thereby granted, at the costs of the defendant, grant and execute to the defendant a new lease of the thereby demised premises for such further term as should be equal to the remainder of the term, less twenty days, which the plaintiff should then have or be entitled to in the thereby demised premises under the lease whereby they were demised to the plaintiff, such further lease to be at the same rent and subject to the like covenants as those contained in this indenture and in the indenture whereby the premises were demised to the plaintiff, except the covenant for renewal, he defendant, at his costs, executing a counterpart of such lease.

In this indenture it was also agreed that a right of way and use in common of the gateway and court-yard abutting north on the thereby demised premises should be reserved to the Goldsmiths' Company, their suc-

cessors and assigns, the superior landlords of the said premises, for the use of their tenant for the time being of the warehouse situate and being at the north-west angle of the said court-yard; and it was thereby further agreed, that it should be lawful for the plaintiff, his executors, administrators, or assigns, and his and their superior landlord or landlords for the time being, and the officers of the establishment in which the premises should be insured against fire, at the times therein mentioned, to enter and see the state of repair.

Under this demise, the defendant entered, and held possession of the premises thereby demised.

On the 18th of April, 1849, by a memorandum in writing of that date, subscribed by the plaintiff and the defendant respectively, the plaintiff agreed to let to the defendant the first floor front warehouse or room of the said No. 5, Bread Street, London, for three years from Lady-Day, 1849, and so on for so long as both parties should agree, at the yearly rent of 60*l.*, payable quarterly, the first quarterly payment to be due on the 24th of June, 1849, and, at the expiration of the lease already granted to the defendant as aforesaid of the said ground floor and basement warehouses, to grant a lease of the said first floor front room for such term as the plaintiff had agreed to do by the said lease dated the 30th of May, 1846, at the rent of 60*l.* per annum.

Under this agreement, the defendant entered, and held possession of the premises therein agreed to be let, and therefor paid, and the plaintiff accepted, rent quarterly as and from the 25th of March, 1849, at the rate of 60*l.* per annum.

On the 25th of September, 1852, the defendant, by notice in writing of that date, required the plaintiff to execute to the defendant, at his costs, on or before the 25th of March then next, a new lease of the premises

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Agreement of
April 18, 1849.

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demised by the indenture of the 30th of May, 1846, according to the plaintiff's covenant in that behalf.

After the expiration of the term granted by the lease of the 30th of May, 1846, the defendant continued in possession of the premises thereby demised, and of the premises agreed to be let by the said memorandum of the 18th of April, 1849; and the defendant continued to pay, and the plaintiff to accept, rent for the said two sets of premises respectively, quarterly, as before, at the said respective rents of 230*l.* per annum and 60*l.* per annum.

Plaintiff tenant
to the Gold-
smiths' Com-
pany.

At the time of the fire hereinafter mentioned, the plaintiff was the tenant from the Goldsmiths' Company of the house No. 4½, Bread Street, adjoining the said house No. 5, under a demise thereof made to one Francis Nalder, bearing date the 14th of June, 1849, for a term of which fourteen and a half years were unexpired at the time of the fire.

Fire, Dec. 31,
1853.

During the continuance of the defendant's possession as aforesaid, viz. on the 31st of December, 1853, the said house No. 5, Bread Street, London, and the said adjoining buildings, No. 4½, so held by the plaintiff as tenant to the Goldsmiths' Company as aforesaid, were wholly consumed by fire, with the exception of the larger portion of the party-wall separating No. 4½ from the premises occupied by the defendant, as shewn on the plan No. 1, post, p. 38.

Plan submitted
by plaintiff to
the Goldsmiths'
Company.

The Goldsmiths' Company having signified their intention to commence re-building, the plaintiff transmitted to them a plan, which he prayed them to adopt in the re-building,—see the plan No. 3, post, p. 35. This plan was rejected by the Goldsmiths' Company. The re-building was completed in December, 1854.

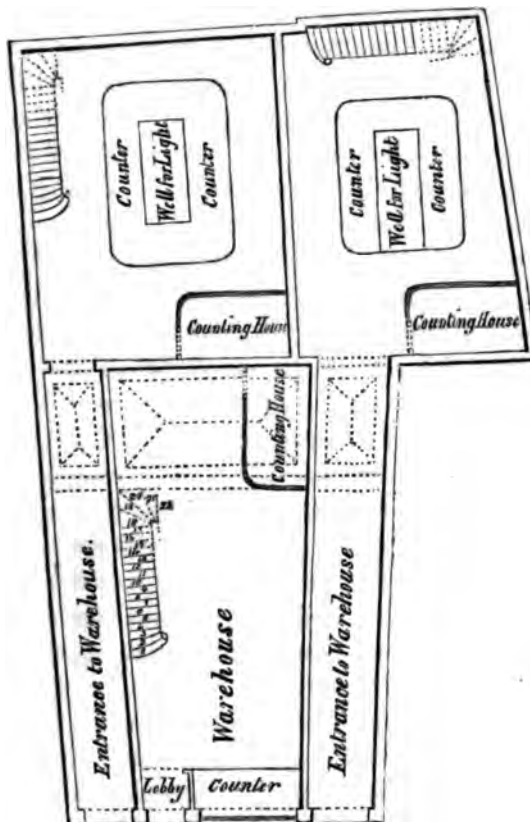
Plan signed by
plaintiff.

On the 8th of April, 1854, the plaintiff and Philip Hardwick, the architect acting for and on behalf of the Goldsmiths' Company, signed the plan according to

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PLAN No. 3.



PLAN OF GROUND FLOOR.

1855. which the premises burnt were re-built, being the plan
 UPTON No. 2, post, p. 39.
 v.
 TOWNEND.

Agreement of
 May 4, 1854.

On the 4th of May, 1854, by an agreement made between the said Philip Hardwick, architect, acting for and on behalf of the Goldsmiths' Company, and the plaintiff, the said Philip Hardwick agreed, that, as soon as the buildings thereafter mentioned should be completed, the said company would demise by indenture to the plaintiff "All that plot of ground situate on the west side of Bread Street aforesaid, as described in the plan attached to the said agreement, together with the messuage or dwelling-house and premises intended to be built thereon, as thereafter mentioned, for twenty-four years from Lady Day, 1854, at the yearly rent of 270*l.* 12*s.* 6*d.* for the first three years, and the yearly rent of 500*l.* for the residue of the said term." And the said Philip Hardwick thereby, for and on behalf of the said company, agreed, within the first year of the term thereby agreed to be granted, to erect and finish, fit for occupation, two capital warehouses and messuages, according to the said plans and specifications signed by the plaintiff and the said Philip Hardwick respectively, as aforesaid. And the plaintiff thereby agreed to repair the said messuage and buildings, and to accept the said demise, and to execute a counterpart thereof, whenever tendered to him for that purpose.

The plot of ground mentioned in the last-mentioned agreement comprised the ground formerly covered by Nos. 4½ and 5, Bread Street aforesaid, as herein-before mentioned.

Re-building.

After that agreement, and before the 24th of June, 1854, the said Philip Hardwick pulled down what remained of the party-wall which originally divided No. 4½ from the premises occupied by the defendant, and afterwards proceeded to erect and build on the sites formerly occupied by Nos. 4½ and 5, two new warehouses, according to the plan No. 2, post, p. 39.

One of the said new warehouses was built upon the area of what was No. 4½, Bread Street, and also upon part of the area of what was No. 5; and the other new warehouse was built upon the residue of what was No. 5.

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The new party-wall dividing the new No. 4½ from the new No. 5, was carried up to the height of several feet above the level of the first floor before the 24th of June, 1854.

State of the
premises.

The plan No. 1 shews the state of the house No. 5, Bread Street, London, and of the adjoining premises, No. 4½, at the time when they were so consumed by fire.

Plans.

The plan No. 2 shews the state of the re-buildings on the site of the premises so destroyed by fire.

The plan No. 3 is a copy of that which, as before mentioned, was sent by the plaintiff to, and rejected by, the Goldsmiths' Company.

The several dimensions respectively marked on the plans are correct.

On the 4th of May, 1854, by deed-poll of that date, indorsed on the lease of the 1st of December, 1836, and signed and sealed by the plaintiff,—after reciting that the premises demised by the indenture of 1st of December, 1836, had been recently burnt down; and that, upon the treaty and agreement for the re-building of the same, it was agreed by the said company, upon the application of the plaintiff, to grant to him an extension of the term created by the said indenture of the 1st of December, 1836; and that, for the purpose of enabling the said company to grant such extension, it was further agreed that the plaintiff should surrender to the said company the said lease, and the residue of the said term,—the plaintiff, in pursuance of the said agreement surrendered to the Goldsmiths' Company all the premises described by that indenture, and all his estate and term

Surrender by
plaintiff to the
Goldsmiths'
Company.

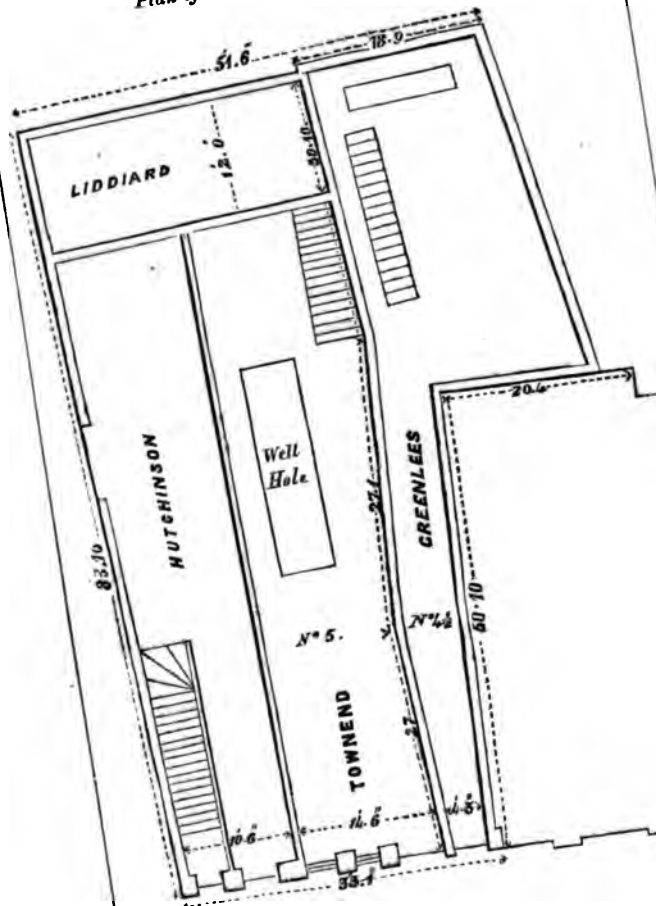
IN THE COMMON PLEAS,

1855.

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PLAN No. 1.

PLAN NO. 1.
Plan of the Premises before the Fire.



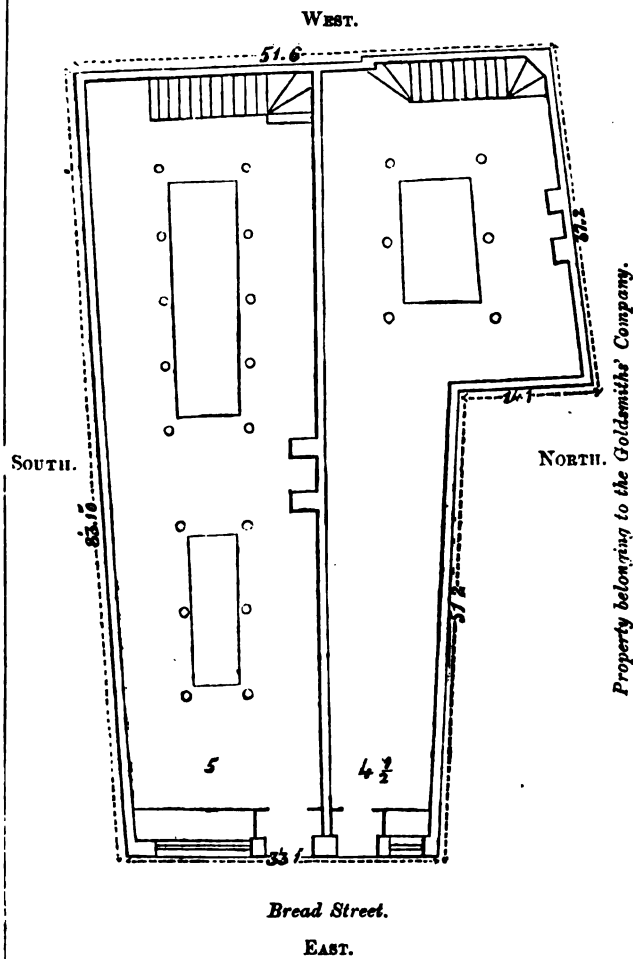
Bread Street.

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PLAN No. 2.

Plan on Lease dated 19th October, 1854.



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New lease from
the company to
plaintiff, Oct.
19, 1854.

therein, to the intent and purpose that the Goldsmiths' Company might be enabled to grant to the plaintiff a new lease of the said premises for the term of twenty-four years from the 25th of March, 1854.

On the 19th of October, 1854, by indenture of that date, sealed with the corporate seal of the company, and also executed by the plaintiff, the company demised to the plaintiff for a term of twenty-four years from the 25th of March, 1854, at a yearly rent of 270*l.* 12*s.* 6*d.* for the first three years of the said term, and a yearly rent of 500*l.* for the remaining twenty-one years of the said term, the said two new warehouses so erected and built by the said Philip Hardwick as aforesaid, by the description of "All those two newly-erected capital messuages or warehouses situate, lying, and being on the West side of Bread Street, and numbered 4½ and 5, as the same are intended to be occupied by the said Thomas Upton, or his under-tenants; which said messuages, warehouses, and hereditaments, are more particularly described in the plan thereof drawn in the margin of these presents,"—being a plan identical with the plan No. 2, antè, p. 39.

No assent of
defendant.

The defendant never authorised or consented to the plan signed by the plaintiff and the said Philip Hardwick, or the agreement of the 4th of May, 1854, or the deed-poll of that date, or the lease of the 19th of October, 1854, and has not since the aforesaid fire in fact occupied any part of the premises held by him under the lease of the 30th of May, 1846, and agreement of the 18th of April, 1849, respectively; nor has he at any time or in any way assented to the alterations.

On the 7th of June, 1854, the defendant's attorney sent the following letter to the plaintiff:—

"126, Wood Street, Cheapside.
7th June, 1854.

Letter of com-
plaint.

"Dear Sir,—I called at your office this morning to see you about the premises in Bread Street, lately

occupied by Messrs. Townend and Mr. Greenlees, but was not fortunate enough to meet with you. I could not call yesterday, being engaged at the West End. Before any further progress is made with the building, I must really and earnestly call your attention to the fact, that, as far as one can at present judge, the premises will be altogether different from those leased or agreed to be leased by you to the before-mentioned gentlemen; and that the alterations are of such a nature as entirely to deprive them of any beneficial occupation of the premises. They instruct me to press this upon your attention, as well as to protest against the contemplated alterations; and I must also inform you, that, if such alterations are persisted in, they will be compelled to take such legal steps as they may be advised, either for preventing their interests being so materially prejudiced, or for obtaining compensation for the loss they must sustain. I trust you will endeavour to obviate either of these courses, as it is really the wish of Messrs. Townend and Mr. Greenlees to arrange the matter with you in an amicable spirit, and without any recourse to litigation.

(Signed) "Chas. Sawbridge."

On the 23rd of May, 1854, the plaintiff entered into the following agreement with Messrs. T. & M. Hutchinson & Speller, viz.

Memorandum, dated 23rd of May, 1854. The undersigned Thomas Upton having agreed with the Goldsmiths' Company to grant him a lease of a certain plot of ground situate on the West side of Bread Street, in the city of London, containing covenants on the part of the said company to erect and finish thereon two messuages consisting of warehouses and premises, the said Thomas Upton hereby agrees with Messrs. T. & M. Hutchinson & Speller to let to them, and they the said Messrs. T. & M. Hutchinson & Speller agree to take of the said Thomas Upton, for three years from the 29th of Septem-

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May 23, 1854.

1855.	ber, 1854, one of the said messuages so to be erected, being that which will consist of warehouses next adjoining to the house No. 6, Bread Street, at the annual rent of 530 <i>l.</i> , payable quarterly, the first payment to be made on the 25th of December, 1854: the said rent to be paid free of all sewers' rate and all other rates and taxes whatsoever, income-tax excepted, which are to be wholly paid by the said Messrs. Hutchinson & Speller, and to keep the said premises in good and substantial repair. The said Thomas Upton also agrees, upon receiving from Messrs. Hutchinson & Speller, before the expiration of the said three years, six calendar months' notice of their desire for the same, to grant to them a lease of the same premises for the further term of seven or fourteen years, subject to the same rent of 530 <i>l.</i> , and payment for insurance, as aforesaid, and containing usual covenants, and particularly covenants and conditions similar to those contained in the lease to be granted to the said Thomas Upton by the Goldsmiths' Company; all expenses of and attending the said lease, and of a counterpart thereof to be signed by the said Messrs. Hutchinson & Speller, to be wholly paid by them. Should the premises not be ready for occupation by the 29th of September, then the rent to commence on the day possession is given."
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Payment of rent.	<p>The premises mentioned in this agreement are the new No. 5.</p> <p>The said annual rents of 230<i>l.</i> and 60<i>l.</i>, respectively, have been duly paid by the defendant, and accepted by the plaintiff, by quarterly payments, up to and inclusive of the quarterly payments respectively due on the 25th of December, 1853.</p>
Payment into court.	<p>The defendant has not paid any further or other rent, except the sum of 72<i>l.</i> 10<i>s.</i> paid into court in this action as aforesaid, and considered as satisfying the said quarterly payments respectively due on the 25th of March, 1854.</p>

The court were to be at liberty to draw any inferences of fact from the facts herein stated, which a jury might draw.

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The question for the opinion of the court was,—Whether the plaintiff was entitled to recover in this action the further sum of 72*l.* 10*s.* for rent up to the 24th of June, 1854, or any part of the said sum.

If the court should be of opinion in the affirmative, then the verdict to stand for the sum of 72*l.* 10*s.*, or such part thereof as the court should order; and judgment should be entered thereon accordingly. If the court should be of opinion in the negative, then the verdict was to be set aside, and a nonsuit entered in lieu thereof.

Henderson (with whom was *Channell*, Serjt.), for the plaintiff. (a) 1. The premises in question were surren-

1. As to the effect of the surrender.

(a) The points for argument on the part of the plaintiff were as follows:—

“That neither the destruction of the buildings by fire, nor the withdrawal of the defendant from actual occupation during the process of re-building, affects the continuance of the defendant’s tenancy, or his liability to pay rent; that such liability would have continued, even if there had been no re-building,—*Baker v. Holtzapfel*, 4 Taunt. 45, *Izon v. Gorton*, 5 N. C. 501, 7 Scott, 537; and that there was no agreement that the liability should cease on fire, as in *Parker v. Gibbins*, 1 Q. B. 421.

“That the surrender by the plaintiff of his term did not affect the defendant’s term,—Co. Litt. 338. b.; and that,

under the new lease of the 19th of October, 1854 (sealed before the commencement of this action), the plaintiff is entitled to his rent, as if there had been no surrender,—4 G. 2, c. 28, s. 6; 8 & 9 Vict. c. 106, s. 9.

“That there has been no eviction; that the right and duty (under the lease to the plaintiff) of the superior landlords to enter and re-build, is, in effect, recognised in the lease to the defendant; that a difference in the plan adopted in the re-building, even if improper and wrongful, is not an expulsion; that the rent claimed is for part of the period during which (as the re-buildings were going on) the defendant could not have occupied in fact, whatever had been the

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dered by the plaintiff to the Goldsmiths' Company, the superior landlords, on the 4th of May, 1854. The premises having in the meantime been re-built, a new lease was granted to him on the 19th of October. The rent in respect of which this action is brought became due on the 24th of June. It will be contended, on the part of the defendant, that, by the operation of the surrender, the right to the rent was gone, and that it was not revived by the grant of the new lease. It is submitted, however, that the effect of a surrender by a termor who has granted an under-lease, is, that the estate of the termor still subsists, notwithstanding the surrender, for the purpose of preserving the under-tenant's interest. The statute 4 G. 2, c. 28, s. 6, in terms provides for the case. That section,—reciting that “many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and that many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewing of the principal lease, by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees,”—for preventing such inconveniencies, and for making the renewal of leases more easy for the future, enacts, “that, in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall without a surrender of all or any the under-leases be as good and valid to all intents and purposes as if

plan of the re-building; and that, for the period during which, by reason of the fire and necessary re-building, no beneficial use could be made of the

premises, rent was no less due from the defendant to the plaintiff, than from the plaintiff to the superior landlords.”

all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued, and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease, any law, custom, or usage to the contrary thereof notwithstanding." The statute vests in the plaintiff the same rights as he would have had if his original lease had still subsisted. In *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715, 721, Lord Tenterden said: "I have no doubt the intention of the legislature, in framing the clause 4 G. 2, c. 28, s. 6, was, to place all parties, as to every matter, in the same situation as if no surrender had taken place. Whether the words they have used are sufficient to effectuate that intention or not (though I should rather think they are), it is not necessary now to pronounce an opinion." The circumstance of the new lease not having been granted until

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after the rent became due, can make no difference: it is enough that it was granted in pursuance of the previous agreement. The 8 & 9 Vict. c. 106, s. 9, provides an universal rule: it enacts, "that, when the reversion expectant on a lease made either before or after the passing of this act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered, or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease." The object of that statute was merely to *preserve* the incidents annexed to the reversion; and that limited operation of the act is perfectly consistent with the statute of 4 G. 2, c. 28, which transfers those incidents to the present plaintiff, leaving him all the same remedies as if there had been no surrender.

2. Use and occupation lies.

2. The next question is, whether the action for use and occupation will lie. If the circumstances do not amount to an eviction, then the defendant is clearly liable for use and occupation under the 11 G. 2, c. 19, s. 14: and the fact of the destruction of the premises by fire makes no difference,—*Baker v. Holpzaffel*, 4 Taunt. 45; *Izon v. Gorton*, 5 N. C. 501, 7 Scott, 537. It was argued, in the last-mentioned case, that the act of entering by the superior landlord, for the purpose of re-building, amounted to an eviction; but that argument was overruled by Tindal, C. J.

3. No eviction.

3. Then it is said that the effect of what is alleged in the case to have been done in respect of the premises, is, to work an eviction. It may be assumed that the posi-

tion of the new party-wall, before the rent in question became due, viz. before the 24th of June, 1854, indicated an intention to alter the form of the premises : and it may be that the Goldsmiths' Company and their architect were guilty of an illegal act. But, in order to shew an eviction, it is essential to shew something amounting to an eviction *by the landlord himself*. Now, what has the plaintiff done? The only act which he did in the matter, was, affixing his signature to the plan for re-building the premises, which was submitted to him by the Goldsmiths' Company. That clearly cannot amount to an eviction either in form or in substance. [*Jervis, C. J.* The question is, whether it did not amount to an authority or consent on his part to the superior landlords doing the acts complained of.] It could be no more than a mere expression of opinion that the plan proposed was a desirable one, and that, so far as he was concerned, he did not object to its adoption : the company might have obtained the assent of the defendant ; or, in the event of his assent not being obtained, he might have defended his possession, or have applied to a court of equity to restrain the company from an undue interference with his rights. The plaintiff had no control over the building. But, assuming that the plaintiff *is* identified with the Goldsmiths' Company, it is submitted that there has been no eviction at all. By reason of the fire, the premises were during the whole year not in a situation to be beneficially occupied by any one. There could not, therefore, be any actual expulsion : neither was there any constructive expulsion,—any interference with the defendant's enjoyment of the subject matter of the demise. If the defendant has sustained any wrong at the hands of the company, he may have his remedy against them. The agreement between the plaintiff and Hutchinson & Speller in no degree affected the defendant's rights.

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1. As to eviction.

Honyman (with whom was *Byles*, Serjt.), for the defendant. (a)

1. There has in this case been a clear eviction, and an eviction by the consent or procurement of the plaintiff. Neither the plaintiff nor the Goldsmiths' Company could during the defendant's term lawfully make any alteration in the premises demised to him, without first obtaining his consent. The case shews, that, before anything was done towards reinstating the premises, the plaintiff signed the plan No. 2 prepared by Mr. Hardwick on the part of the Goldsmiths' Company, by way of intimating his consent to the premises being re-built in the manner therein indicated. On the 4th of May, 1854, the plaintiff entered into an agreement with Hardwick, as agent for the company, to take a new lease of the premises when completed. In the meantime, and before the rent now claimed became due from the defendant, the party-wall dividing the premises held by the defendant from those adjoining being carried up several feet above the level of the first floor, and so indicating an intention to alter the condition of the premises, the

(a) The points marked for argument on the part of the defendant, were,—

"1. That it appears by the case, that, before the rent sued for became due, the plaintiff's interest in the premises had been determined by the surrender of his lease to the Goldsmiths' Company on the 4th of May, 1854:

"2. That, after the surrender by the plaintiff of his interest, no new demise by the Goldsmiths' Company to the plaintiff would entitle the plaintiff to treat the defendant as his tenant, without a new

agreement for tenancy between the plaintiff and the defendant:

"3. That, even if a new demise could have such an effect, it is found by the case that the new lease from the Goldsmiths' Company to the plaintiff was not executed until the 19th of October, 1854:

"4. That, under the circumstances stated in the case, the defendant is not liable to be sued for use and occupation:

"5. That the case shews an eviction of the defendant by the plaintiff before the rent sued for became due."

defendant gave a notice to the plaintiff protesting against the contemplated alterations; notwithstanding which the building proceeds; and, on the 19th of October, 1854, the plaintiff accepts a new lease of the premises in their altered state. Under the circumstances, it is impossible that a jury could come to any other conclusion than that the plaintiff was a party to the alteration. Further, the plaintiff on the 23rd of May, 1854, entered into an agreement to let the premises in question to third persons. A portion of what was formerly occupied by the defendant is now become part of the adjoining premises, and that by the authority of the plaintiff. That clearly amounts to an eviction; and it is no answer to say, that, if the Goldsmiths' Company or the plaintiff have been guilty of a wrongful act, the defendant may have another remedy. He clearly has a right, in answer to an action for use and occupation, to say that by the acts or procurement of the plaintiff he is deprived of the occupation of a portion of that which was the subject matter of the demise. Neither is it any answer to say that the defendant has not been deprived of any beneficial occupation: the landlord, according to the dictum of Sir J. Mansfield in *Baker v. Holtpzaffel*, had no right, by entering to re-build, to deprive him of any part of the premises, although in their then state the defendant could have had very little beneficial occupation of them.

2. Then, as to the surrender. But for the statute 8 & 9 Vict. c. 106, s. 9, the moment a lessor surrenders, his right to rent would be gone. The question, therefore, is, whether there is anything in that statute to entitle the plaintiff to maintain this action. The original lease was surrendered by the plaintiff to the Goldsmiths' Company on the 4th of May, 1854. The rent claimed in this action accrued on the 24th of June; and the new lease granted by the company to the plaintiff was executed on the 19th of October, and granted him a term

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of twenty-one years from the 25th of March, 1854.

But, although the duration of the plaintiff's term was to be measured from the 25th of March, his *interest* in the premises is to be measured from the date of the actual execution of the lease,—*Steele v. Mart*, 4 B. & C. 272, 6 D. & R. 392; *Shaw v. Kay*, 1 Exch. 412. The statute 8 & 9 Vict. c. 106, s. 9, was not intended to operate retrospectively. The mischief that enactment was designed to remedy, was, the landlord's being disabled from obtaining a renewal of his term, by the refusal of his under-tenant to surrender the under-lease; and the remedy provided, is, to declare that the new lease shall, without surrender of the under-lease, be as good and valid as if the under-lease had been likewise surrendered.

The statute 8
& 9 Vict. c.
106, s. 9, is
retrospective in
its operation.

[*Williams, J.* It goes on to provide that "all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, &c., shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued," &c.] In *Webb v. Russell*, 3 T. R. 393, it was held, that, if tenant for a term of years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to the reversionary interest are thereby extinguished. The 8 & 9 Vict. c. 106, was passed to obviate that. That being so, what was there to prevent the Goldsmiths' Company from suing the defendant for the rent accruing in the interval? [*Williams, J.* The statute *must* operate retrospectively.]

Reply.

Henderson, in reply. In the interval between the

surrender of the old lease and the grant of the new one, the plaintiff could not have maintained an action against the defendant for rent ; neither was he liable for rent to the Goldsmiths' Company. But, on the execution of the new lease, the rights of both parties revived, and all the remedies existed as if there had been no interruption of the term. Actual eviction here is out of the question ; and, if there can be an eviction by reason, not of expulsion, but of interference with the enjoyment of the premises, that is not the present case : the defendant has all his rights and his remedies as perfect as he had them before. An eviction is not to be lightly inferred. It is not every deviation from the original plan of the premises, that will constitute an eviction. By analogy to the law of disseisin, the eviction must be one of fact, and not merely constructive. And it is clear that here there has been no actual eviction by *the plaintiff* ; his merely signing the plan submitted to him on the part of the Goldsmiths' Company clearly cannot have that effect. It did not, and could not, take away from the defendant his right to object to the alterations, and could not involve a consent on the plaintiff's part to the company's going on with the re-building against the will of the defendant.

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JERVIS, C. J. We shall defer our judgment in this case until after the argument of *Upton v. Greenlees* : and, in the mean time, the court are desirous of hearing a correct legal definition of eviction.

Upton v. Greenlees.

This action was also commenced on the 31st of October, 1854, and the plaintiff's claim indorsed on the writ of summons was as follows :—

" 1854, June 24th. Half-year's rent of house No. 4½, Bread Street, Cheapside, London, 87l. 10s."

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The declaration was for money payable for use and occupation of messuages and premises, and on accounts stated. The defendant pleaded a denial of the debt, except as to 43*l.* 15*s.*, parcel of the money claimed, and, as to that sum, payment into court. The plaintiff accepted that payment in satisfaction pro tanto, and joined issue as to the rest.

By consent of the parties, and pursuant to an order of Crowder, J., the question between the parties was submitted to the court upon the following case:—

Demise by the
Goldsmiths'
Company to
Nalder, June
14, 1849.

On the 14th of June, 1849, the Goldsmiths' Company, of London, being then seised in fee-simple in possession of the premises hereinafter mentioned, by indenture of that date, sealed with their corporate seal, and also executed by Francis Nalder, demised to the said Francis Nalder, for twenty-one years from the 24th of June, 1847, the houses and premises Nos. 40 and 41, Cheapside, London, subject to the annual rent of 630*l.* 2*s.* 6*d.*, payable quarterly, and also to the payment to the company, on the 25th of March in each year, of such money as they should have paid, or be bound to pay, for the premium and duty for insurance of the said premises from loss or damage by fire. That indenture contained covenants on the part of Nalder to pay the said rent and money without any exception, and to repair, casualties by fire to the extent thereafter specified only excepted; and, on the part of the company, to shew a policy insuring the demised premises from loss or damage by fire to the extent of 7000*l.*, to keep that insurance in force during the continuance of the demise, and that, if the demised premises, or any part thereof, should at any time during the said term be destroyed or damaged by fire, all such money as might be recoverable by virtue of such insurance, or a sufficient part thereof, should with all convenient speed be applied towards the re-building and repairing the

premises, or such part thereof as should be so damaged or destroyed. That indenture also contained a stipulation that it should be lawful for the company and their officers, and for the officer of the establishment in which the premises should be insured against loss or damage by fire, to enter the demised premises, and examine the state thereof.

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Under this demise, Nalder entered, and had possession of the thereby demised premises for the said term; and, afterwards, all his estate and interest in the premises vested by assignment in the plaintiff.

Assignment to
plaintiff.

On the 12th of June, 1851, by a memorandum in writing of that date, subscribed by the plaintiff and the defendant respectively, the plaintiff agreed to grant to the defendant on or before the 24th of June, 1851, or when required by the defendant, and at his costs, a lease of part of the said premises, by the description of "All that messuage or tenement, with the appurtenances, situate and being No. 4½, Bread Street," for a term of five years and a half from the said 24th of June, 1855, at the yearly rent of 175*l.* payable quarterly, on the four usual days for payment of rent,—the first quarterly payment to become due on the 29th of September, 1845; and that, in such lease, the plaintiff should covenant for quiet enjoyment: And the defendant thereby agreed to accept such lease, and to execute a counterpart thereof; and that in such lease and counterpart should be contained covenants for payment of the said rent as aforesaid, and of sewer-rates, and all other rates, charges, taxes, and assessments, and to keep the premises and fixtures in repair during the term, and so to deliver them up to the plaintiff, reasonable use and wear only excepted, and not to underlet without the consent in writing of the plaintiff, nor do anything contrary to the stipulations contained in the said lease of the 14th of June, 1849: And it was thereby mutually

Agreement of
June 12, 1851.

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agreed that a ground floor warehouse belonging to Francis Nalder, apparently part of the premises thereby agreed to be demised, but then parted off therefrom by a temporary partition, did not form part of the premises thereby agreed to be demised; and that, until a lease should be executed pursuant to that agreement, the defendant should enter and occupy the premises thereby agreed to be demised, as tenant from year to year, from the 24th of June, 1851, under the rents, covenants, and agreements stipulated to be inserted in the said intended lease.

Under this agreement, the defendant entered, and occupied the premises thereby agreed to be let, and paid, and the plaintiff accepted, rent for the same, at the said agreed rate, by quarterly payments, on the four usual days for payment of rent, up to and inclusive of the 25th of December, 1853. No lease or counterpart was prepared, or required.

The plaintiff was, at the time of the fire hereinafter mentioned, also lessee, by separate instrument of lease, under the said Goldsmiths' Company, of the premises No. 5, Bread Street, next adjoining to the defendant's premises, for a term whereof three years and a quarter were then unexpired.

Fire.

During the defendant's said occupation of the said premises, viz. on the 31st of December, 1853, the buildings on the land in the defendant's occupation, together with the adjoining buildings No. 5, were partially consumed by fire; but the greater portion of the party-wall separating the premises in the defendant's occupation from those adjoining, as shewn in the plan No. 1, was not destroyed. And the defendant thereupon quitted the occupation of the premises so theretofore in his occupation.

Plan proposed
 by plaintiff.

The Goldsmiths' Company having subsequently signified their intention of re-building, the plaintiff trans-

mitted to them a plan for re-building, which plan however was rejected by the company. The re-building was completed in December, 1854.

On the 8th of April, 1854, Mr. Philip Hardwick and the plaintiff signed the plans according to which the premises burnt were re-built, and being the plan No. 2, ante, p. 39: and, on the 4th of May, 1854, by an agreement made between Philip Hardwick, acting on behalf of the Goldsmiths' Company, and the plaintiff, the said Philip Hardwick agreed, that, when and so soon as the buildings thereafter mentioned should be completed, the said company would demise all that plot of ground situate on the west side of Bread Street aforesaid, as described in the plan attached to the said agreement, together with the messuage, dwelling-house, and premises intended to be built thereon, to the plaintiff, from the 25th of March, 1854, for the term of twenty-four years, at the rent for the first three years of the said term of 270*l.* 12*s.* 6*d.*, and, for the remainder of the said term, of 500*l.*: and the said Philip Hardwick, for and on behalf of the company, agreed, within the first year of the said term, to erect, build, and finish, fit for occupation, two capital warehouses and messuages according to the plans and specifications signed by the plaintiff; and the plaintiff agreed to accept such demise as aforesaid, and to execute a counterpart thereof, whenever tendered to him for that purpose.

After that agreement, and before the 24th of June, 1854, the said Philip Hardwick pulled down what remained of the party-wall which so originally divided No. 4½ from No. 5, and afterwards proceeded to build the said two warehouses according to the plan No. 2.

One of the said new warehouses was built upon the area of what was No. 4½, Bread Street, and also upon part of the area of what was No. 5; and the other new

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Plan signed by plaintiff.

Agreement of May 4, 1854.

Party-wall pulled down.

Premises rebuilt.

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UPTON v. GREENLEES.	The party-wall dividing the new No. 4½ from the new No. 5, was carried up to the height of several feet above the level of the first floor before the 24th of June, 1854.
No occupation or assent by the defendant.	The defendant has not since the fire in fact occupied any part of the premises demised to him ; nor has he in any way assented to the alterations.
Proposal to let.	The plaintiff, before the 24th of June, 1854, offered to demise the new premises, No. 4½, Bread Street, to other persons than the defendant, at a rent of 600 <i>l.</i> per annum ; and said to such persons that the defendant had no claim on him for the said premises, as he had no lease ; that he was no longer his tenant ; and that he never would allow him to rent another brick under him.
Acceptance of new lease,— Oct. 19, 1854.	On the 19th of October, 1854, the plaintiff accepted a new lease from the Goldsmiths' Company, of the premises demised to the defendant, as well as those adjoining, for a term of years commencing from the 25th of March, 1854.
	The defendant never authorised or consented to the plan signed by the plaintiff and Philip Hardwick, or the agreement of the 4th of May, 1854, or the lease of the 19th of October, 1854.
Letter of re- monstrance.	On the 7th of June, 1854, the defendant's attorney sent the following letter to the plaintiff :—[see the letter, <i>antè</i> , p. 40.]
	The defendant has not paid rent for any period subsequent to the 25th of December, 1853, except the 43 <i>l.</i> 15 <i>s.</i> paid into court in this cause, and considered as satisfying the rent which became due on the 25th of March, 1854.
Plans.	The plan No. 1 (<i>antè</i> , p. 38) shews the state of the premises occupied by the defendant before and at the time of the fire. The plan No. 2 (<i>antè</i> , p. 39) shews the state of the premises after the re-building.

The court was to be at liberty to draw any inference of fact which a jury might draw.

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Question.

The question for the opinion of the court was,—Whether the plaintiff was entitled to recover in this action the sum of 43*l.* 15*s.*, or any part thereof, for rent due on the 24th of June, 1854. If the opinion of the court should be in the affirmative, then judgment was to be entered for the plaintiff, by confession, for the sum of 43*l.* 15*s.*, or such other sum as the court should order, with costs.

If the court should be of a contrary opinion, then a judgment of non-pros was to be entered.

Field, for the defendant. (a) There is no substantial difference between this case and that of *Upton v. Townsend*. The main question is, whether that which has happened amounts to an eviction of the tenant from a part of the subject matter of the demise, so as to operate a suspension of the rent which otherwise would have become due to the plaintiff on the 24th of June, 1854. One of the earliest authorities on the subject of eviction, is to be found in Gilbert on Rents, p. 178, where, speaking of apportionment of rent, the learned author says,—“But, if the lessor takes a lease of *part* of the land, or enters *wrongfully* into part, there are variety of opinions whether the *entire* rent shall not be *suspended* during the continuance of such lease or tortious entry. Some have held that there shall be no apportionment in either case, but that the whole should be suspended; for this reason, I suppose, because, by the demise, every part of the land was equally chargeable with the whole rent; and therefore the lessor shall not by his own act dis-

Eviction.

(a) The points marked for argument on the part of the defendant, were,—

“That there was an eviction of the defendant by the plain-

tiff before the rent claimed became due; and that the defendant is not liable to be sued for use and occupation.”

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charge any part from the burden during the continuance of such contract. This, indeed, may be a good reason why the whole rent-service shall be suspended, if the lord or lessor *disseises* or *ousts* his tenant or lessee of any part of the land ; because this is a *wrongful act*, to which the tenant consented not : and, if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract ; and so, by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law. Therefore, to prevent these inconveniences, and that no man might be encouraged to injure or disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him, these resolutions have been : and so the law is at this day, that such *disseisin* or *tortious entry* suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it, till he be restored to the whole possession. But there is no colour or reason why the whole rent should be suspended, when the lord or lessor *takes a lease* of part of the land ; because here is the concurrence of the tenant, who, by his own act and consent, parts with so much of the land as is re-demised, and thereby supersedes the former contract as to such part." Amongst other authorities cited in the margin is, Co. Litt. 148. b., where Lord Coke says : " A rent-service (saith Littleton) may be extinct for part, and apportioned for the rest ; but a rent-service cannot be suspended in part by the act of the party, and in esse for other part. So it is if the lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part." [Jervis, C.J. Lord

Coke uses "eviction" and "tortious entry" as synonymous.] The principle is, that, being deprived of the enjoyment of a portion of the subject-matter of the demise, the tenant's obligation to pay rent, the consideration for which was the enjoyment of the thing demised, is at an end. In *Hodgkins v. Robson*, 1 Ventr. 276, Lord Hale says,—“If the lessor enters into part by wrong, this shall suspend the whole rent; for, in such case, he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue.” In *Smith v. Raleigh*, 3 Campb. 513, which was an action for the use and occupation of a house and garden, it appeared, that, after the defendant had agreed to take the premises at an entire rent, and possession had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the use of a number of his other tenants; whereupon the defendant returned the keys to him: and Lord Ellenborough ruled “that this amounted to an eviction from part of the demised premises, which, the taking being single, and the rent entire, he considered a complete answer to the action.” [*Jervis*, C. J. That is very like the present case.] In *Hunt v. Cope*, Cowp. 242, the plea was held bad for not alleging an eviction or expulsion. In *Roper v. Lloyd*, Sir T. Jones, 148, the mere entry by the lessor, and pulling down and carrying away a pent-house fixed to the messuage, and part of the premises demised, was held to be a mere trespass, and no eviction, so as to operate as a suspension of the rent. That case would seem to shew that the question is whether the entry of the landlord is of such a permanent and substantial character as to deprive the tenant of part of the thing demised, or is of a merely temporary nature, susceptible of compensation in damages. In the present case, the tenant is permanently deprived of a part of the thing demised. Having had a given area demised to him, the

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1855. landlord has entered and pulled down the external walls, and placed one of them elsewhere. [*Crowder, J.* The plans shew that Greenlees in the new state of the premises would get more than he had before.] He has acquired no title to the additional piece. [*Williams, J.* The pulling down the old wall was no eviction.] It rendered the premises useless to the defendant. [*Jervis, C. J.* If I have a close called Blackacre surrounded by lands of other persons, the fences belonging to them, and my lessor removes the fences,—does that amount to an eviction?] It might. [*Jervis, C. J.* Removing the floor or the roof of a building would be an eviction or expulsion. Why should not the taking away one of the sides be so too? *Williams, J.*, referred to *Cherbourn v. Rye*, Cro. Eliz. 341. There, to debt upon a lease for years of a house and land, the defendant pleaded that the lessor had entered upon part of the land let, and that he had pulled down part of the house, and so had suspended his rent. The plaintiff replied, that the defendant had re-entered into the land, and into that part where the house stood. And, upon demurrer, the question was, whether the re-entry did not revive the rent. “Popham and Gawdy conceived the rent is not revived; for, when the house was let, it is part of the cause for which the rent was reserved; and, when the lessor had taken from him part of the benefit, scil. the house, yet his re-entry into the land where the house stood doth not revive the rent. Fenner and Clench doubted. Et adjournatur.”] The question is, has there been that which is equivalent to a permanent deprivation of the tenant of the thing demised. [*Williams, J.* Its *permanence* cannot be the criterion, because it is only a *suspension* of the rent. The true principle is, that the rent is suspended, because it no longer issues out of the entire subject matter of the demise.] Here, the wall was an essential part of the subject matter of the

demise. [*Williams, J.* I am unable to see that the pulling down the party-wall can amount to an eviction of the tenant from the space it bounds.] Actual expulsion is not necessary to constitute an eviction: *Tomlinson v. Day*, 5 J. B. Moore, 558, 2 B. & B. 680; *Burn v. Phelps*, 1 Stark. N. P. C. 94. [*Williams, J.* In *Hunt v. Cope*, Aston, J., says: "All the cases in the books suppose the lessee to be put out of possession." He refers to *Bushell v. Lechmore*, 1 Lord Raym. 370. *Harrison's Case*, Clayton, 34, and *Reynolds v. Buckle*, Hob. 326. *Harrison's Case* was as follows:—"He had made a lease of a house, reserving rent, and after commanded the breaking of a partition-wall in the said house; and it was holden this was no such re-entry into the house as will make an extinguishment of the rent; for, that must be a continuance of the possession, and putting out the lessee." (a)] The next question is, whether, upon the facts stated in the case, the acts complained of can be said to have been done by the plaintiff. [*Jervis, C. J.* As to that, we are all, I believe, agreed.]

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Henderson (with whom was *Channell, Serjt.*), contra (b) The mere signing of the plan submitted to him by the architect of the Goldsmiths' Company did not make the plaintiff a party to the act of trespass of which the defendant complains: It amounted to no more than an expression of approbation as to the style of building to be adopted,—like the case of a committee-man assenting to the style of building for a club-house or a literary institution.

There is but little to be found in the books upon the subject of eviction. The only direct authority is the case of *Smith v. Raleigh*, 8 Campb. 513: but there, not only had the landlord taken possession of a portion of

Eviction.

(a) Cited *Viner's Abridgment, Rent* (A. a.), pl. 11. argument were as in the former case, ante, p. 43.

(b) The plaintiff's points for

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the land demised, but the tenant had given up the keys, and so placed himself right in a court of justice. Here, the defendant never relinquished his possession; there was nothing to amount to a change in the relation of landlord and tenant. All the other instances cited are mere dicta, no one of which professes to give,—what, indeed, it would be very difficult to do,—a general definition of an eviction. Would the landlord's taking out the windows of the demised premises amount in law to an eviction? [*Jervis*, C. J. If the landlord were to take out the windows with the intention of compelling the tenant to vacate the premises, I do not think a jury would have much difficulty in coming to the conclusion that he was guilty of an eviction.] Intention can have no bearing upon the question whether there has been an eviction in point of law. Besides, in the case supposed, there is an intention on the part of the landlord to make it impossible for the tenant to enjoy the premises,—which is totally inconsistent with the case of one who insists that his right of possession remains. The question is whether the act complained of amounts to an absolute turning out of possession, or is a mere deterioration of the tenant's enjoyment of the thing in respect of which the rent is claimed. The older authorities would seem to shew that there must be an actual physical expulsion of the terretenant by the disseisor. Littleton, § 279, says,—“Note that disseisin is properly where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.” Lord Coke, in his commentary upon that section (Co. Litt. 181. a.), observes,—“This description of disseisin, and the ‘&c.’ in this place, is to be understood only of such lands and tenements whereunto an entry may be made; and not of rents, commons, &c. A note here, that every entry is no disseisin, unless there be an ouster also of the freehold. And therefore Lit

ton doth not set down an entry only, but an ouster also, as an entry and a claimer, or taking of profits, &c." Again,—253. b.,—Lord Coke says: "Disseisina is a putting out of a man out of seisin, and ever implieth a wrong." (a) Whatever inconvenience the tenant might sustain in this case, might be compensated by an action for damages, and therefore would be no answer to a claim for rent,—*Hart v. Windsor*, 12 M. & W. 58. It is by no means clear that even the pulling down of the house would amount to an eviction: but, at all events, the mere non-feasance, the omission to build up the walls after the fire in the precise way in which they stood before clearly cannot. Whatever the effect of the plaintiff's signing the plan submitted to him on the part of the superior landlords, nothing had taken place prior to the 24th of June, 1854, which could amount either in law or in fact to an eviction.

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JERVIS, C. J. I am of opinion that there must be judgment for the defendant in each of these cases. The same general principle of law will govern both; the distinctions between them I will point out shortly. First,

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Townend.*

(a) See Tomlins's edition of Lyttleton's *Tenures*, p. 271, n. (s), where it is said: "A disseisin means an unlawful ouster or putting out of possession (§ 279); but it has been considered in a much larger sense by Lyttleton, as in this instance (§ 238), and, in short, any possession by another not recognised by law, of the whole or any part of the land and rent issuing out of land, or any obstruction or impediment offered to the possessor or right owner in the enjoyment of it, was deemed a disseisin. In-

deed, it is apparent from this paragraph (§ 238), that disseisins might be either accompanied with violence or be effected without any violent act; and hereafter it will be shewn by Lyttleton (§ 588), that, for the purpose of the owner's entitling himself to certain remedies, one of which Lyttleton here mentions, he might *elect* to be disseised, *i. e.* he was at liberty to feign or suppose himself to be disseised, as the feoffment of the adverse possessor to a stranger was allowed to be a disseisin."

1855. <hr style="width: 100px; margin-left: 0;"/> UPTON v. TOWNEND. Eviction.	as to the case of <i>Upton v. Townend</i> . The view the court takes of the question of eviction, renders it unnecessary to express any opinion as to the effect of the surrender, or upon the other matters which have been suggested in the course of the arguments. The simple question, then, is, whether there was an eviction by Upton of Townend, the tenant, from a part of the premises demised, before the 24th of June, 1854, so as to operate a suspension of the rent. It is not denied that an eviction of the tenant from a part of the demised premises is for the present purpose the same as an eviction from the whole. In dealing with the question whether there has in this case been an eviction in fact, and whether the plaintiff was a party to it, we are by the concession of the parties put in the position of a jury, and are at liberty to draw such inferences of fact from the circumstances stated as a jury would be warranted in drawing. It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved, and put out. The word eviction,—from evincere, to evict, to dispossess by a judicial course,—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled, that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby suspended. The term “eviction” is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the in-
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tention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention. The case of *Smith v. Raleigh*, 3 Campb. 513, in its circumstances, approaches very nearly to the present case,—that is, the case of Townend. There, the tenant railed off a portion of the garden which had been demised with the house at one entire rent, for the purpose of erecting a building for the accommodation of his other tenants; and it was held to amount to an eviction. Now, there, as here it has been suggested, the tenant might have taken down the railing, and rased the building,—treating the landlord's act as a mere trespass. But, inasmuch as it was done with the intention of permanently depriving the tenant of the enjoyment of a portion of the subject matter of the demise, and the rent issuing out of the whole, the entire rent was suspended by the landlord's act of withdrawing a portion from the tenant's occupation. So, the case of *Hunt v. Cope*, Cowp. 242, where the question arose upon the form of pleading, shews to a certain extent, that, if the facts there relied on had been pleaded in a technical form as an eviction, it would have gone to the jury, and they would have said whether or not the circumstances did amount to an eviction. The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.

As to Townend's case, sitting here with the power to draw inferences as a jury would, I can entertain no doubt. He has, it is suggested, more commodious premises than he had before. Be it so: the landlord had no right to give him a less space than he had before; the tenant might very well say, "I am entitled to have the thing which was originally demised to me, neither

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more nor less ; and, as you have deprived me of that, I am exonerated from my tenancy." In his case, therefore, there can be no question that there has been an ouster in fact from a portion of the thing demised.

Then, as to Greenlees,—it appears, that, in re-building the messuages, a portion has been added to what the tenant had before. But still the question arises,—is it the thing demised ? The landlord has no right to impose upon his tenant a thing different from that which he undertook to let to him. It seems to me, therefore, that, though there is that distinction between the two cases, the one is as much a deprivation of the enjoyment of the thing demised as the other. There clearly is evidence whence the court must infer, that, by the act of somebody, the tenants have been deprived of the enjoyment of the premises demised to them respectively.

Then, the only remaining question is, whether the plaintiff has by his conduct made himself a party to that which in point of fact amounts to an eviction : and that, I think, admits of no doubt. It appears from the case that the Goldsmiths' Company had entered into a covenant with the plaintiff to let to him certain premises which comprised those which were subsequently underlet to both the defendants, and also covenanted to insure the premises in a certain sum, and to re-build them in the event of their destruction by fire. As between Mr. Upton and the Goldsmiths' Company, therefore, the effect of the covenant was, to enable Mr. Upton to compel the company to restore the buildings exactly as they stood before. We may assume that the parties,—that is, Upton and the company's agent or representative,—met for the purpose of ascertaining in what manner that should be done ; that the matter was discussed between them ; and that Upton, the only person who could compel the company to restore the premises as they were, authorised them to deviate from the original plan. He must,

therefore, be taken to have constituted the company his agents for the purpose of re-building in the form so agreed upon. In Townend's case, a wall has been erected upon a portion of the premises demised to him. In the case of Greenlees, a small addition has been made to the area of his premises, by re-building the party-wall outside the spot where it formerly stood. In both cases, the wall is intended as a permanent erection,—to remain for all time. In Townend's case, the plaintiff enters into an agreement to let the new premises to Hutchinsons & Speller; and, in Greenlees's case, also, he offered to let the premises to other persons before the 24th of June, 1854, observing that the defendant should never hold another brick under him. These clearly were acts of a permanent character done by the landlord, without the assent of the tenants, shewing an intention to oust them from the possession of the premises. As matter of fact, therefore, it seems to me that there is enough to satisfy us that there has been an eviction of the tenants, with the consent and procurement of the landlord, so as to disentitle the latter to maintain this action: and, consequently, I am of opinion that in both cases our judgment must for the defendant.

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WILLIAMS, J. I am entirely of the same opinion. As to the last point, I agree with the observations of my Lord, and do not think it necessary to add anything. Assuming that the acts done by Mr. Hardwick, the architect of the Goldsmiths' Company are identical with the acts of the plaintiff, the question is narrowed to the inquiry whether those acts amount to an eviction of part of the demised premises, so as to operate a suspension of the rent. It appears to me that they do in both cases. Considering how frequently transactions of this sort are taking place, it is somewhat remarkable that so little is to be found in the books upon the subject of eviction.

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There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction. We have been much pressed by Mr. Henderson, in the course of the argument, with a reference to the state of things at the time the acts here complained of were done, viz. that the premises had been burnt down, and were incapable of any beneficial occupation. But it must be borne in mind that it is the plaintiff who has to make out that he is entitled to maintain an action for use and occupation. There has been no *actual* occupation; and the question is whether there has been an eviction with respect to the tenant's *constructive* occupation. In *Hall v. Burgess*, 5 B. & C. 332, 8 D. & R. 67, a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year: before the next half year expired, the landlord let the premises to another tenant, who occupied the same: and it was held, that the landlord was not entitled to recover rent from the first tenant, from the expiration of the current year, when he quitted the premises, to the time when the landlord relet the same to the second tenant. Holroyd, J., there says: "Before the 11 G. 2, c. 19, the landlord's remedy by action for his rent must have been upon the demise, and he could only recover according to it. The tenant's endeavour to give up the premises in this case was unavailing, and the possession was not altered until the subsequent letting by the landlord. *That letting, therefore, was an eviction of the tenant*, and, had this action for rent been brought upon the demise, the defendant

might have pleaded the eviction as a bar." The same principle appears to have been decided by Lord Ellenborough in *Burn v. Phelps*, 1 Stark. N. P. C. 94. There, the defendant, being tenant to the plaintiff of premises in Worcestershire, at 130*l.* per annum, under-let the premises to Badger and several other under-tenants: during this tenancy and the under-tenancies, the plaintiff gave notice to Badger and the other under-tenants to quit, and Badger had in fact quitted, and the premises occupied by him, worth 60*l.* per annum, remained unoccupied for one year: at the expiration of the year, Phelps again under-let them to another tenant; and he still continued in possession of the whole by his under-tenants: the defendant had paid into court a sum which covered all the rent claimed except the 60*l.*, which he insisted was not due to the plaintiff. And Lord Ellenborough expressed an opinion, that, under the circumstances, the plaintiff was guilty of an eviction, as to the premises occupied by Badger, at the least, and suggested that an eviction might have been pleaded to the whole demand. How can it be doubted, in either of these cases, that the acts done by the agent of the Goldsmiths' Company, were acts of interference with the tenants' rights, rendering it incompatible for them to hold according to the terms of their respective demises, and that those acts were done with the intention of no longer permitting the tenants to enjoy the premises as they were entitled to enjoy them? I feel no doubt whatever that the facts disclosed in these special cases do amount to what the law calls an eviction, and consequently that the plaintiff's right to sue for the rent is gone.

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CROWDER, J. I am of the same opinion. With respect to Townsend's case, I am clearly of opinion that the defendant is entitled to our judgment: and, as to

1855. Greenlees, though I have entertained some doubt, I am now disposed to agree with the rest of the court that our judgment must be the same way. The question is, whether the tenants have been evicted from part of the demised premises, so as to disentitle the plaintiff to sue for the rent accruing between the 25th of March and the 24th of June. It seems that there is no very distinct definition of eviction in any of the books, as employed with reference to acts done by a landlord towards his tenant. As to the acts of a stranger, it is very well defined. Eviction, properly so called, is, a wrongful act by the landlord, which operates the expulsion or amotion of the tenant from the land. The question here is, whether there has been an eviction as it is popularly called, a putting out or depriving the tenants of the subject matter of the demise. The nearest case which I have heard cited, is that of *Smith v. Raleigh*, 3 Campb. 513. The act there complained of doubtless was an act of trespass,—and indeed every entry by a landlord upon the possession of his tenant must include a trespass: but Lord Ellenborough considered it to amount to an eviction. It seems to me that there is in the case of *Townend* strong evidence of that species of eviction. The fallacy of Mr. Henderson's argument, as it struck me, was, that he rested the conduct of the landlord entirely upon the assent given by him to the plan for rebuilding proposed to him by the architect of the Goldsmiths' Company. It is necessary, however, to look at all the surrounding circumstances. The Goldsmiths' Company were bound to re-build. Upton had a right to have the premises restored in the same position in which they were before the fire. Having himself proposed a plan differing from the original structure, Upton afterwards assents to Mr. Hardwick's plan, and accepts a lease of the premises erected pursuant to it. By the agreement of the 23rd of May, 1854, Upton actually lets a

portion of the premises to another person, including a part of what had formerly composed Townend's demise. That clearly was an act done by the landlord amounting to an expulsion or amotion of the tenant, and a preventing him from occupying the premises according to the demise. In the case of Greenlees, the new building allots him a somewhat larger space than he had before. But still it is a depriving him of the occupation of *the thing demised*. Although, therefore, I agree that it is not every act of trespass by a landlord that will amount to an eviction, I think in both cases the tenant has been substantially and permanently deprived of the subject matter of the demise, so as to entitle him to say that he has not had the occupation of that which he was entitled to.

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WILLES, J. I am of the same opinion. There is nothing in the argument that the Goldsmiths' Company ought not to be considered as the agents of the plaintiff in doing the acts complained of. It is not necessary that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist, in order to make one responsible for the tortious act of another: it is enough if it be shewn to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent, are quite consistent with the party's liability irrespective of any such relation: as, if I agree with a builder to build me a house according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work; but clearly I would be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it. Mr. Henderson has likened eviction to a disseisin. Now, assum-

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ing that to be correct, I find it laid down in Co. Litt. 180. b., that, "if A. disseise one to the use of B., who knoweth not of it, and B. assent to it, in this case till the agreement A. was tenant of the land, and after agreement B. is tenant of the land, but both of them be disseisors; for, *omnis ratihabitio retrotrahitur et mandato equiparatur*. And it is worthy of the observation, and implied also in the latter ' &c., ' that, seeing *coadjutors, counsellors, commanders, &c.*, are all disseisors, that, albeit the disseisor which is tenant dieth, yet the assise lieth against the *coadjutor, counsellor, commander, &c.*, and the tenant of the land, though he be no disseisor." Several cases are referred to in the note to Co. Litt. 181. a., as to trespassers by procurement. Here, the circumstances, as to this point, are these:—The Goldsmiths' Company were bound by covenant with the plaintiff to expend 2500*l.* in building up the premises as they were before the fire. Having that right, he proposed a plan,—a totally different one. The architect of the company proposed another, departing still further from the original plan of the building. To that the plaintiff assented, signed the plan, and agreed to take a new lease of the premises when re-built according to that plan. It is clear, therefore, that the plaintiff counselled and procured the re-building according to that plan, and is answerable for it. Then, if the plaintiff is liable for what has been done, does it amount to an eviction? I am of opinion that it does, as being an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or of a part of it. I cannot agree with Mr. Henderson, that there must necessarily be a going upon the land, and an actual expulsion of the tenant from the possession. That part of his argument is not supported either by principle or by authority. Many cases are collected in Viner's

Abridgment, *Rent* (I. a.), which shew that it is not necessary that there should be an actual bodily expulsion of the tenant from the land. Thus, in *Cibel v. Hills*, Leon. 110, "it was given in evidence of an entry, &c., for the suspension of rent, that on the land demised was a brick-kiln and a small cottage, and that the lessor entered and went to the cottage and took some of the bricks, and untiled the cottage. But it was proved that the lessor had reserved the bricks and tiles, which in truth were there ready made at the time of the lease granted, and that he did not untile the brick-kiln house, but that it fell by tempest; and so the plaintiff did nothing, but came upon the land to carry away his own goods; and also he used the bricks and tiles on the reparation of the house. And, as to the extra tenet, which was parcel of the issue, the lessor did not continue upon the land, but went off from it, and relinquished the possession. But the court held, the continuing the possession or not was not material; for, *if he once does anything amounting to an entry*, though he departs presently, yet the possession is in him sufficient to suspend the rent, and he shall be said extra tenere the defendant, the lessee, till he has done an act amounting to a re-entry." In Co. Litt. 381. b., I find this incidentally laid down as to disseisins, in a passage cited from Bracton (a):—"Per hoc autem quod dicitur in brevi ultimæ præsentationis deforceant, videtur quibusdam quod querens innuat per hoc quod deforceans sit in seisinâ, sicut in brevi de recto, sed reverâ non est ita, sed satis deforceat qui possessorem uti seisinâ non permiserit omninò vel minùs commodè impediât præsentando, appellando, impetrando, secundum quod dicitur de disseisitore, *satisfacit disseisinam, qui uti non permisit possessorem vel minùs commodè licet*

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(a) Bract. lib. 4, fo. 238; Fleta, lib. 5, cap. 11.

1855. *omnino non expellat.*" It is not true, therefore, as suggested, that the older authorities required an actual expulsion to constitute disseisin. In the same book, 158. b., the distinction between a mere act of wrong and a dispossession is pointed out in the following terms:—
 "Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo fortè ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam, sed transgressionem, &c. Quærendum est à judice *quo animo* hoc fecerit, &c." An entry upon the land of another, and an expulsion of or a substantial interference with the enjoyment of the land by the tenant,—as in the case of a diversion of the entire stream from a mill, or preventing a man from having access to his land, or entering his orchard and cutting down all the fruit trees,—though the wrongdoer do not remain upon the land, appear to me to be equally cases of eviction, if the tenant in consequence ceases to occupy. This also appears to have constituted a disseisin, from Co. Litt. 161. a., where it is said: "He that disturbs a man of the meane disseiseth him of the thing itself; as, the turning of the whole stream that runs to a mill, is a disseisin of the mill itself. So it is if a man be disturbed to enter and manure his land, this is a disseisin of the land itself; for, qui adimit medium dirimit finem, and qui obstruit aditum destruit commodum." Supposing that, as Mr. Henderson contends, the law of disseisin is analogous to that of eviction, the argument from analogy appears to be in favour of the defendants. What are the facts? In Townend's case, instead of the thing demised to him, a wall was built upon part of the land, which wall is a permanent structure, and excludes him from the occupation of the portion of the land upon which it stands, and he has not occupied the rest. All the conditions of eviction are therefore in his case fulfilled. In the case of Greenlees,

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the same space that he had before was left open ; but the wall has been removed four or five feet from the old boundary ; he, therefore, could not use his premises without incurring the constant danger of committing a trespass on the land of another, and he was deprived of the protection and support of the boundary wall, and hindered from restoring the place to the state in which he was entitled to enjoy it ; and he has not in fact occupied any part of the land. In both cases, therefore, as it seems to me, the tenant was, by an act of the landlord, which was intended to be, and was, of a permanent character, deprived of the perfect and convenient use of the thing demised. He was virtually expelled and amoved from the subject matter of the demise ; and that expulsion and amotion occurred before and continued until the rent now sought to be recovered would have become due. No rent, therefore, became payable. For these reasons, I agree with the rest of the court in thinking that the defendant in each case is entitled to judgment.

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Judgment for the defendants respectively. (a)

(a) See Kent's Commentaries, Vol. III, p. 464. And see the judgment of the Supreme Court of the United States, in the case of *Pendleton v. Dyett*, 4 Cowen, 581, 585, where Sutherland, J., who delivers the judgment, says : " I apprehend there can be no *eviction*, without an *actual entry*. The very definition of the term *eviction*, is, an *expulsion* of the lessee out of all or some part of the demised premises : and Serjt. Williams says, that, to occasion a suspension of the rent, the plea must state an *eviction* or ex-

pulsion of the lessee by the lessor, and a keeping him out of possession until after the rent became due ; otherwise it will be bad : 1 Wms. Saund. 204, n. (2). If a constructive expulsion, without entry, may constitute an *eviction* which will operate as a suspension of the rent, why is the averment of an entry contained in all the precedents, and why do all the cases agree that without such averment the plea would be bad ? Thus, in *Timbrell v. Bullock*, Style, 446, it is said, that, to make a suspension of rent reserved upon a

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lease for years, the lessor must oust the lessee of part of the thing let at least, and hold him out until after the day on which the rent is made payable by the lease; and, if the lessee re-enters, the rent is revived.

A re-entry pre-supposes an actual ouster or expulsion. So, in *Page v. Parr*, Style, 432, which was an action of covenant for rent, the defendant pleaded in bar that the plaintiff entered into a part of the land demised, before the rent became due, and so had suspended his rent. The plaintiff replied that the defendant re-entered, and so was possessed as in his former estate. To which replication there was a demurrer. And Rolfe, C. J., held the demurrer well taken, on the ground that the replication did not state that the defendant, after re-entry, continued in possession until the rents were due: and judgment was given for the defendant.

According to the case of *Salmon v. Smith*, 1 Saund. 204, and note (2), the plea would be now held bad for omitting to state that the defendant was kept out of possession until the rent became due. But this case also clearly contemplates an actual entry or ouster by the lessor as necessary in order to suspend the rent. So, in *Reynolds v. Buckle*, Hobart, 328, which was an action of debt for rent, the defendant pleaded, that, before rent due, the plaintiff entered upon him, but did not say that he did expel him or hold him out; and the plea, on that ground, was declared to be of itself an insufficient bar. But in that case it was cured by the verdict. *Bushell v. Lechmore*, 1 Ld. Raym. 369, also decides that a mere entry or trespass, without an eviction, will not suspend the rent. Upon this point, all the cases concur."

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MYERS and Others v. WILLIS.

Nov. 8.

THIS was an action brought by the plaintiffs against the defendant as the alleged owner of a ship or vessel called the "Celt," for damages for the non-conveyance on board of such ship of a cargo of guano shipped thereon at Paquica, for the plaintiffs, to be conveyed thereby to the united kingdom in pursuance of a memorandum of charter between the plaintiffs and John Bayley Leith, the master of the said ship, and bill of lading signed by such master in that behalf, and for advances by them to such master in pursuance of such memorandum of charter, and insurance, and interest thereon, and expenses incurred, as hereinafter mentioned. The defendant denies all liability in respect of the plaintiffs' claims.

The writ was issued on the 3rd of November, 1853. A copy of the pleadings and particulars was annexed, and was to be referred to as part of the case, which was stated for the opinion of the court, in pursuance of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

About the month of January, in the year 1851, Joseph Brandeis, being sole registered owner of the British ship "Celt," of Liverpool, sent her on a voyage under

The register is no evidence of ownership, so as to fix the party whose name appears thereon for contracts entered into on behalf of the ship by the master.

A. advanced money to the owner of a vessel at sea, receiving from him by way of security a bill of sale of the ship, accompanied by a letter as follows:—

"You have this day (August 1st, 1851) given me your acceptance for 1000*l.* against the inward freight of my barque the Celt, which vessel I am expecting will load home from the Pacific; and it is understood she is to be consigned to you inwards on

arrival, and you are to reimburse yourself from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due repayment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me." A. registered the bill of sale on the 2nd of August, 1851:—

Held, upon a special case in which it was agreed that the court should draw such inferences of fact as a jury might draw,—that the register was per se no evidence of ownership, but that the court might look at all the circumstances, to see whether it was the intention of the parties, at the time of giving the bill of sale, that A. should become the absolute owner of the ship, so as to be liable for contracts entered into by the captain for the benefit of the ship, or whether he was to take her merely as security for his advance.

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the command of Captain John Bayley Leith, with instructions, after delivery of her outward cargo of coal, which was shipped for and on account of Mr. Brandeis, to go to Valparaiso, and apply to Messrs. Joseph Hegan & Co., merchants there, to procure him a cargo home. He also wrote to Messrs Hegan & Co., to the same effect. The ship sailed in the beginning of 1851 from England, having the certificate of registry on board, in which Mr. Brandeis's name appeared as registered owner; and she never returned.

On the 1st of August, 1851, Mr. Brandeis executed an absolute bill of sale of the ship, in the common form, to the defendant, the head of the firm of H. H. Willis & Co.; the consideration expressed being the payment of 1000*l*. This bill of sale was dated 31st of July, 1851, and was produced by Mr. Willis to the collector and comptroller of the port of Liverpool, where the ship was registered; by whom it was entered on the register of the ship in the Liverpool registry book, on the 2nd of August, 1851, as an absolute bill of sale to Henry Hinckley Willis: but the required particulars of such bill of sale were not indorsed on the certificate of registry, which was on board the ship as above mentioned, which was then at sea, and which never returned to Liverpool.

Although the bill of sale appears absolute upon the face of it, it was in fact intended to be only a collateral security to Messrs H. H. Willis & Co., insurance-brokers in London, for the re-payment of a bill of exchange for 1000*l*. drawn by Mr. Brandeis upon and accepted by H. H. Willis & Co., as mentioned in the following copy of a letter from Mr. Brandeis to Messrs. Willis.

“Messrs. H. H. Willis & Co.

“London, 1st August, 1851.

“Gentlemen,—You have this day given me your

acceptance for 1000*l.*, at six months' date, the 31st ulto., against the inward freight of my barque the Celt, Captain Leith, which vessel I am expecting will load home from one or more ports on the west coast of America in the Pacific; and it is understood she is to be consigned to you inwards on arrival, and you are to reimburse yourselves from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due re-payment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me.

(Signed) "Joseph Brandeis."

The following are copies of the entries above referred to, in the Liverpool ship registry book:—

"CELT.

"Subscribing Owners.	Shares.
"Joseph Brandeis, of Liverpool, in the county of Lancaster, merchant, a British subject, by certificate of naturalization, dated 4th February, 1846.	Sixty-four.
"Other Owners. (Nil.)	

"Entered, 2nd August, 1851. It appears by a bill of sale, dated 31st July, 1851, that Joseph Brandeis, of Liverpool aforesaid, merchant, has transferred sixty-four sixty-fourth shares to Henry Hinckley Willis, of 3, Crosby-Square, in the city of London, merchant."

The ship, having delivered her outward cargo, proceeded to Valparaiso; and, in pursuance of the instructions above mentioned, and by the procurement and advice of the said Messrs. Hegan & Co., the captain, on the 13th of December, 1851, properly effected a memorandum of charter with the plaintiffs, merchants at Valparaiso trading under the firm of Myers, Bland, & Co., who were, as also was the master at that time,

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1855. entirely ignorant of the state of the ownership of the
 MYERS ship, which was mutually signed by the said John
 v. Bayley Leith and the plaintiffs.
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The following is a copy of the charterparty.

Charterparty.

"It is this day mutually agreed between John Bayley Leith, master of the British barque Celt, of Liverpool, 306 tons register measurement, and now lying in the port of Valparaiso, of the one part, and Myers, Bland, & Co., of Valparaiso, merchants, of the other part :—

"1. That the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, shall, with all convenient speed, proceed to the port of Coby, for a license to load, and orders from charterers' agent, and from thence to Paquica, where she shall take in, on the terms hereinafter mentioned, a full and complete cargo of guano in bulk (and part in bags for lining the ship), not exceeding what she can reasonably stow and carry; and, being so loaded, shall, after clearing at the Custom House at Coby, proceed to the port of Cork, in Ireland, for orders, and thence for a safe port of discharge in the united kingdom; and with liberty to call at a port in Chili for the purpose of procuring specie and passengers for owner's benefit :

"2. The ship to pay all port-charges, and to be consigned to charterers' agent at Coby, who will charge the sum of thirty dollars as agency for transacting the ship's business :

"3. Forty-five working days are to be allowed the charterers for loading the cargo at Paquica, to be computed from the day the master gives written notice that the ship is ready to receive cargo there, to the day the charterers' agent gives similar written notice that she is at liberty to proceed on her voyage; and twenty running days shall be allowed the said master at a port in Chili for the purposes hereinbefore mentioned, with twenty

running days on demurrage, in either case, at the rate of 5*l.* sterling per day, to be paid by the party delinquent to the party observant :

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" 4. The cargo to be placed in the ship's boats clear of the surf, and in them to be conveyed on board at shipper's risk and ship's expense :

" 5. The ship to take no other cargo but that shipped by the charterers : and, should political or other circumstances prevent there being sufficient labourers at Paquica, the master agrees to send part of his crew on shore to ship the cargo, they receiving the usual labourers' daily pay whilst so employed :

" 6. The ship to carry freight-free to loading port any empty bags, provisions, or stores, and to give ship-room and water to a number of men (not exceeding twenty) from Valparaiso to loading port and back, should it be required ; and also, if required, to deliver free of charge at Paquica a quantity of water not exceeding five tons :

" 7. The ship to find sufficient dunnage for the proper stowage of the cargo ; and the owners to be liable for all damage arising from side lights or ports. The master to sign bills of lading without reference to rate of freight, and without prejudice to his charterparty :

" 8. The ship shall be consigned to charterers' agents at the port of discharge (Liverpool excepted), where, on the vessel's arrival, the cargo shall (in the dock named by the said charterers' agents) be discharged and taken from along side as fast as the custom of the said port will admit of :

" 9. Freight to be paid as follows : 35*s.* sterling in full for every ton of 20 cwt. avoirdupois, net weight, of guano delivered at the Queen's beam :

" 10. The master to be supplied in the Pacific with a sum not exceeding 150*l.*, free of interest and commission, which, together with insurance on such advance, is to be in part payment of freight, at the exchange of 50*d.* per

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dollar : and, should the charterers think fit to advance any further sum on the credit of the freight, for repairs, stores, and disbursements, such sum, with interest, commission, and insurance, is also to be considered in part payment of freight ; the master's receipt in either case to be considered binding on the owners : 200*l.* on arrival of the vessel at the port of discharge to be paid cash, less three months' discount ; and the balance on the true and right delivery of the cargo, by good and approved bills on London at three months' date, or in cash, less the usual discount, at the option of the charterers' agents. And, for the due and punctual fulfilment of each and all the conditions herein mentioned, the contracting parties do hereby bind themselves to each other in the penal sum of 600*l.* sterling, to be paid by the party delinquent to the party observant :

“ Should the vessel refuse to receive on board labourers for this port, according to article 6, on the plea of proceeding thence direct to Cork, and, instead of so doing call at this port, the master shall forfeit the sum of 100*l.* sterling, or an equivalent.

(Signed) “ John B. Leith.

“ Myers, Bland, & Co.”

In pursuance of the 9th article of the above charter-party, the plaintiffs advanced moneys to the captain, for the necessary disbursements of the ship, amounting at the specified exchange to the respective sums of 152*l.* and 462*l.* 10*s.* sterling, for which the captain signed receipts.

The cost of insurance of these sums amounted to 37*l.* 3*s.* 9*d.*

The ship “Celt” afterwards proceeded, in pursuance of the said charter, to the port of Cobia, for a licence to load, and from thence to Paquica, where she received on board from the plaintiffs' agents a full cargo of guano in good condition, amounting to 306 tons, for which the

captain signed a bill of lading in the Spanish language, of which the following is a translation :—

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“I, John B. Leith, captain of the English barque Celt, now at anchor in this port of Paquica, ready to sail on her voyage to Cork according to charterparty, have received on board under register entry, marked and numbered as per margin, from Jose William Whiting, agent of Messrs. Myers, Bland, & Co.,

306 tons of
guano, in 400
sewn sacks,
and the rest in
bulk.

306 register tons of guano from the guano deposits of St. Alep and St. Koracio, which I declare to have received to my entire satisfaction, and on the same terms, on my safe arrival with the said vessel, I bind myself to deliver in the said port to Myers, Bland, & Co., or their order, who, on verifying my faithful delivery, have to pay me the freight and transport thereof as expressed in the charterparty. To the due accomplishment whereof I bind my person and goods, more particularly the aforesaid vessel, her freight, tackle, and appurtenances, according to the practice and laws of commerce ; having signed, &c.

All the guano which this vessel carries on board goes for account of the charterers, and will be delivered in the port of its destination according to the conditions stipulated in the charter-party.

“Paquica, 23rd March, 1852.

“John B. Leith.”

The ship, being in proper condition for the voyage, after clearing at the Custom House at Cobya, on the 23rd March, 1852, proceeded to sea, and sailed direct for the port of Valparaiso, being her port of call in Chili, according to the first article of the charterparty.

On the 27th, the vessel arrived at Valparaiso, having encountered rough weather on her passage.

On the 29th, she was surveyed, and the surveyors found that she was much strained. They directed that the whole of the cargo should be discharged, in order that the vessel might be further examined ; and, on the

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22nd of June, after all the cargo had been discharged into a hulk, she was hove keel out, and was again surveyed, and the surveyors found that her stern-post was very much wormed, from the keel to the second gudgeon; her main keel was much wormed from aft as far as amidships: the vessel was much strained about the woods ends forward, and specially aft: the garboard streak and seams under the copper were very slack: and her cutwater had worked considerably. They directed that the main keel, where wormed, and part of her stern-post, should be renewed; and that the remainder of the stern-post and cutwater should be re-fastened; that the vessel should be stripped, caulked, and re-sheathed, and that her topsides and bends should be tied round and caulked where necessary. The surveyors made a careful estimate of the costs of repairing the above-mentioned damages. The estimate amounted to 7074 dollars—(equal to 1474*l.* sterling), from which would have to be deducted the proceeds of the old sheathing.

From the 6th to the 13th of May, seven advertisements were published in two newspapers, asking for a loan of 2000 dollars to be defrayed by bills of exchange on the owners, in order to defray the expenses that would be incurred in repairing the ship; but no one offered to lend the money. From the 6th to the 13th of July, similar advertisements were published, for a loan of 7000 dollars on bottomry on ship and cargo, for the same purpose; but no proposal was made by any one to lend the money. From the 2nd to the 13th of September, the vessel was in consequence advertised for sale; and, on the 13th she was sold.

From the 2nd to the 11th of September, advertisements were published, in a similar manner, for vessels to carry on the cargo to its destination; and the Ferris was chartered for the purpose at 45*s.* per ton. From 150 to 200 tons of guano were put up for sale by the

master on the 27th of September, in order to raise money to pay the expenses incurred on the cargo ; but the highest bid for it at the sale was made on account of the vendor, and therefore it was not sold. Advertisements were then published in two newspapers, from the 5th to the 12th of October, for a loan on respondentia, to pay these expenses ; but no offer was made on them. The ship was then sold by the master. The greater part of the cargo was forwarded by the ship Ferris, and 50 tons by the ship Aparne : and these quantities have since been delivered to the plaintiffs' agents in Liverpool, on payment of the expenses and insurance on them, and of the freight by these respective ships. About 80 tons of guano still remain at Valparaiso.

In February, 1853, Myers & Co., of Liverpool, the English correspondents of the plaintiffs, having been informed by Hegan & Co. that the documents relating to the condemnation of the ship had been forwarded to Mr. Brandeis, applied several times to him for them. He had placed these documents in the hands of Willis & Co. to recover the claims upon the underwriters on policies, which they, as his insurance-brokers, had effected for him ; and he referred Myers & Co. to them (Willis & Co.) for the papers ; and Myers & Co., on the 3rd of March, 1853, wrote to Willis & Co. the following letter :—

“ Liverpool, 3rd March, 1853.

“ Gentlemen,—We are informed that the protest and other papers of the plaintiff are at present in your possession ; and, as we have a heavy claim for advances to this vessel on the west coast, which we cannot recover from our underwriters without these documents, we will be much obliged if you could part with them for a day or two, so as to enable us to put our claim in a course of arrangement.

(Signed) “ W. J. Myers, Son, & Co.”

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In answer to this letter, Willis & Co. wrote and sent to Myers & Co. the two following letters, on their respective dates :—

“ London, 4th March, 1853.

“ Gentlemen,—In reply to your favour of yesterday, we will see Mr. Brandeis, the owner of the Celt, and get him to permit of the papers of this vessel being sent to you.

(Signed) “ Henry H. Willis & Co.”

“ London, 8th March, 1853.

“ Gentlemen,—Referring to our respects of the 4th instant, we beg to inform you that Mr. Brandeis, the owner of the Celt, is on the continent, and is not expected to return for three weeks. As we do not like to obtain the papers from the solicitors without his consent, it must therefore await his return.

(Signed) “ Henry H. Willis & Co.”

“ P.S. The papers were placed in the hands of his solicitors, previous to his leaving London. The nature of his claim on his underwriters is a very complicated one ; and, as we knew not how the matter may terminate, we do not think he would approve our allowing the documents to be sent away.”

On the 14th of April, 1853, Myers & Co. wrote and sent a letter to Willis & Co., of which the following is a copy :—

“ Liverpool, 14th April, 1853.

“ Gentlemen,—Referring to our letter of the 3rd ult., and to your reply on the 8th, we had hoped that you would ere this have put us in possession of the Celt's papers. We have ascertained that this vessel no longer belongs to Messrs. Brandeis & Co., but was transferred to Mr. H. Willis by bill of sale on 31st of July, 1851. We think, therefore, that we have a right to call upon

you to produce the papers ; and we trust you will not put us to further inconvenience by withholding them any longer.

(Signed) "W. J. Myers, Son, & Co."

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After applying to Mr. Brandeis for permission, and obtaining the documents from Mr. Brandeis's solicitors, to whom they had been delivered in order to make a claim for him against his underwriters, Messrs. Willis & Co. sent the documents to Myers & Co.

The bill for 1000*l.* given by Willis & Co., after several renewals, was gradually reduced by payments by Mr. Brandeis, and the balance was ultimately paid on the 10th of March, 1853 (384*l.* 14*s.*), with money received by Willis & Co., as the insurance-brokers of Mr. Brandeis, upon certain policies upon the said ship effected by them on his account, and the remainder, being 295*l.* 18*s.* 5*d.*, with money paid by Mr. Brandeis to Willis & Co.

On the 20th of April, 1853, the defendant re-transferred the ship *Celt* by absolute bill of sale to Mr. Brandeis : and the following entry of such bill of sale was made in the registry books at Liverpool, under the above mentioned entries relating to the said ship :—

"Entered, 22nd April, 1853. It appears by a bill of sale, dated 20th of April, 1853, that Henry Hinckley Willis, of the city of London, merchant, has transferred sixty four sixty-fourth shares to Joseph Brandeis, of Liverpool, in the county of Lancaster, merchant, a British subject, by certificate of naturalization dated the 14th of February, 1847.

(Signed) "R. du Renzy."

Upon the occasion of the said re-transfer, the following letter was written to Mr. Brandeis by Willis & Co., and sent to Mr. Brandeis with the transfer of the ship, and Mr. Brandeis's letter to Willis & Co. of the 1st of August, 1851 :—

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" 3 Crosby Square, 25 April, 1853.

" Joseph Brandeis, Esq.

" Dear Sir,—We beg to inclose herein your undertaking with reference to the assignment of the Celt, now cancelled ; also a bill of sale duly executed by our principal in your favour.

(Signed) " H. H. Willis & Co."

Messrs. Myers & Co., the plaintiffs' agents, having procured from the defendant the documents so applied for as aforesaid, made an unsuccessful application to the underwriters on cargo, and afterwards, on the 27th July, 1853, applied to the defendant for payment ; and, on his refusal, brought the present action.

The following are copies of the plaintiffs' application, and the defendant's refusal :—

" Liverpool, 27th July, 1853.

" H. H. Willis, Esq.

" Messrs. H. H. Willis & Co., London.

" Sir,—On laying before our underwriters the documents respecting the sale of the Celt in Valparaiso, on which we claimed the sum insured for advances made by Myers, Bland, & Co., they informed us that they were not liable, inasmuch as the ship was sold without its having been shewn she had so suffered by the perils of the sea as to make the sale an act of necessity ; and they referred us to the opinion of the surveyors, as expressed in the certificate of survey, that the ship should be repaired.

" We then placed the papers in the hands of Messrs. Oliverson & Co. for an opinion, which they gave, to the effect that they considered the owner of the ship was the party responsible to us for the amount of our claim. We then asked them to say who was the owner of the ship ; and to assist them we placed before them copies of the two entries made in the Custom-House books

here,—one on the 2nd August, 1851, recording a bill of sale of the ship made by Mr. Brandeis to you on 31st July, 1851,—and the other, dated 22nd of April, 1853, recording a bill of sale or transfer of the ship from you to Mr. Brandeis, under date the 20th of April, 1853, at which period it was well known in England that the ship had previously been sold in Valparaiso.

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“We have just received Messrs. Oliverson & Co.’s opinion, which is now before us, and which is to the effect that they consider you to have been the owner of the ship, and therefore liable for the amount of our claim, amounting to 1128*l.* 9*s.* 6*d.* as per note of particular inclosed, and which amount we now request payment of from you.

“To ascertain the amounts which would have respectively fallen on the ship, and on the cargo, which makes up the sum we paid to Messrs. Hegan & Co. before we could get possession of the guano, had the ship been repaired, and sent home with the cargo, as recommended by surveyors, we placed the papers in the hands of an intelligent adjuster of averages, and desired him to frame an average statement based on the assumption that the ship had been repaired; and on this statement we make the charge of 268*l.* 12*s.* 10*d.*, and 51*l.* 8*s.* 4*d.* interest. The document itself is in the hands of Messrs. Oliverson & Co.; and, should you be disposed to resist the claim we now make, we would beg to refer you to those gentlemen, who are our solicitors in the matter.

(Signed) “W. J. Myers, Son, & Co.”

“Messrs W. J. Myers & Co., Liverpool.

“London, 28th July, 1853.

Gentlemen,—Your letter of yesterday much surprised me. Mr. Brandeis, of 92 Tower Street, is and always has been the owner of the Celt; and I cannot see in what respect the fact of my having taken the temporary

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assignment of the vessel, as a guarantee for a temporary loan, should in any way, either in equity or law, make me responsible to you, even should there be any legal responsibility on the part of the owner for the claim you make.

"The vessel was undoubtedly condemned, because no person would advance the necessary funds for her repairs, not from inability to repair her; for, that she could have been repaired, is satisfactorily shewn by the documents in your possession: and Mr. Brandeis considers that his interests have been shamefully sacrificed by the fact of her condemnation without his authority.

"However, seeing the position you take, if you determine upon pursuing the claim against me, instead of the proper owner, Mr. Brandeis, I can only refer you to my solicitor Mr. Cotterill, 32 Throgmorton Street; for, I cannot think of admitting any liability whatever.

(Signed) "Henry H. Willis."

The plaintiffs claimed from the defendant the amount of the above-mentioned advances to the said John Bayley Leith, the master of the ship, in pursuance of the charterparty, with expenses of insurances, and interest, the sums necessarily paid by them for freight for carriage by the ships Ferris and Aparne from Valparaiso to Liverpool of portions of the guano forming the cargo of the ship Celt, in excess of the freight which would have been payable under the charterparty if the ship Celt had proceeded on her voyage to Great Britain, and expenses incurred by the plaintiffs at Valparaiso in warehousing, loading, and forwarding such guano, in consequence of the omission to repair the said ship Celt, and convey the cargo by her to the united kingdom, and damages for not forwarding the 80 tons of guano which were so left at Valparaiso.

Neither the defendant nor his firm in any way inter-

ferred with the vessel, save as herein mentioned; nor did they, nor did Mr. Brandeis, after giving the first instructions, communicate with the master or with Hegan & Co.

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The transactions between Mr. Brandeis and H. Willis & Co. and the defendant, were not known to the master, Messrs. Hegan & Co., or any of the parties concerned, until the registry book was searched on behalf of the plaintiffs.

For the purposes of this case, it was to be taken that the acts of the master were such as would be binding upon the ship and such owner or owners as he had by law under the circumstances mentioned in the case authority to bind.

It was agreed that the court should be at liberty to draw any inference of fact which a jury might draw.

The question for the opinion of the court was,—Whether the defendant was under the circumstances liable to all or any of the above claims.

If the court should be of opinion that the defendant, under the circumstances, was liable to all or any of the above claims, it was agreed that judgment should be entered for the plaintiffs by confession, for such amount as should be fixed and certified by Mr. W. Richards (average stater), with costs.

If the court should be of opinion that the defendant was not, under the circumstances, liable to any of the above claims, then it was agreed that judgment of nolle prosequi, or otherwise, should be entered against the plaintiffs, with costs.

Tomlinson (with whom was *Channell*, Serjt.), for the plaintiffs. (a) The question upon this special case, is,

(a) The points marked for argument on the part of the plaintiffs, were,—

“That the acts of the master, which were to be taken to be binding on the ship and such

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whether the defendant, to whom the Celt had been transferred by absolute bill of sale, with the option of registering her as his own,—an option which he exercised,—is responsible for the acts of the master which are detailed in the case. [*Jervis*, C. J. Does not the admission in the case reduce the question to this,—admitting that the master could bind the real owner by the contracts he has entered into, the register is conclusive evidence of ownership?] Not the register alone, but the surrounding circumstances, coupled with the fact of the defendant having caused himself to be registered as owner. It appears that there was a treaty between Mr. Brandeis and Mr. Willis for an advance of money. Now, it was competent to the parties to secure that advance by a mortgage of the ship and freight. Instead of adopting that course, which might be an imperfect security, it was arranged that a bill of sale should be given, which, upon his electing to register under it, would give the defendant the complete and absolute ownership of the vessel, leaving Mr. Brandeis without power to compel a re-transfer of the ship in case the advance should be repaid. The ownership passed, with all its consequences, to the defendant. [*Jervis*, C. J. The case of *Mitcheson v. Oliver*, 1 Jurist, N. S. 900, settled the law in the way it had been generally understood for some years past, until some old doubts were resuscitated,—that, in order to ascertain who is the owner at the time of the contract which it is sought to enforce, we must look at the circumstances of the case, without reference to whose name appears upon the

owner as he had, under the circumstances, authority to bind, were, under the circumstances, binding upon the defendant, who had previously become, and was at the time of such

acts, absolute legal owner of the ship; and, consequently, that he was liable to the claims in this action founded upon such acts of the master."

register as owner.] The real question is, who made the contract? It is submitted that the facts here disclosed shew that the contract was made with the defendant. The ship being at sea as a seeking ship at the time the advance was made and the bill of sale given, the defendant took upon himself the legal ownership, and, having taken the advantage of the master's contracts, he also took upon himself the risk. The letter of the 1st of August, 1851, from Brandeis to the defendant, clearly shews that it was intended that the latter should if he pleased become the absolute and unqualified owner of the ship. That letter, it is true, makes reference to a sort of understanding or honorary bargain between the parties that the vessel was to be re-transferred to the owner on payment of the sum advanced; but such re-transfer could not be enforced either at law or in equity. [*Jervis*, C. J. What is the meaning of the reservation of power to the court to draw any inference of fact which a jury might draw?] The court can only draw one inference from the facts stated. [*Jervis*, C. J. It may be that the court is by law estopped from drawing that inference; but it seems to me that the only inference of fact which we can draw from what is here stated, is, that the parties did not intend the ship to pass. Would it be competent to a judge to leave that question to the jury?] It is submitted that it would not. [*Jervis*, C. u. Do you mean to go back to the old law, and contend that the register is conclusive?] The proper way to leave the matter to a jury would be, to ask them to say whether or not the parties intended that the defendant should be clothed with the rights of owner,—that he should have absolute control over the captain, and assume the rights and the liabilities incident to ownership. The parties must be presumed to know the law. Mr. Brandeis might have given the defendant a mortgage: but that would not have entitled him to the freight,

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unless he had taken possession: *Kerswill v. Bishop*, 2 C. & J. 529. [*Jervis*, C. J. There is no doubt about that. The object was, to give the defendant the absolute right to the earnings of the ship, but for a qualified purpose, viz. to recoup himself the 1000*l.* advance.] Why give a bill of sale, unless it was intended that the defendant should be clothed with higher rights than those of a mortgagee? It is clear that the defendant was to have the absolute right to the earnings of the ship quâ owner. [*Jervis*, C. J. To a qualified extent: but not to fix him with any contracts the master might enter into. It is after all a mere question of principal and agent.] The parties must be presumed to contemplate the legal consequences of their acts. The agency follows. The defendant by the bargain he has made adopts the ship in her actual position, and with all her future liabilities, and the master as his agent. In the ordinary case of a sale of a ship at sea, the ship being on a seeking voyage, the vendor intending to divest himself of the ownership, and the vendee to assume it, the latter clearly adopts the master as his agent for the unperformed portion of the voyage, and becomes responsible for all acts done by him in relation to the ship that are within the ordinary scope of the master's duty. And, what is there to differ the present case from that? [*Jervis*, C. J. This is in truth a mortgage of the ship, and nothing more.] The ground upon which a mortgagee is held not liable for the ship's engagements, is, that, not being in possession of the ship, he is not entitled to her earnings: *Chinnery v. Blackburne*, 1 H. Bla. 117, n., Abbott on Shipping, 8th edit. p. 35. [*Crowder*, J. Is this any more than a collateral security?] The defendant has chosen to arm himself with the absolute legal ownership, by availing himself of the option of registering the bill of sale. [*Jervis*, C. J. The mortgagee has a title which he can perfect at any time on the ship's arrival. He does not

become retrospectively liable for the contracts of the captain, by entering upon the freight.] In *Trewhella v. Rowe*, 11 East, 435, where a ship was sold in the interval between an order for stores given by the seller and a delivery of them on board, the purchaser was held not to be responsible for them; although he was responsible for such articles ordered by the master after his purchase. [*Jervis*, C. J. There is no doubt about that.] This case in no degree resembles that of a mortgage. [*Williams*, J. Do you contend that a court of equity would not have compelled a re-transfer of the ship, on payment of the 1000*l.* advanced?] Neither at law nor in equity could Mr. Brandeis under the circumstances of this case have any remedy. [*Jervis*, C. J. *Duncan v. Tindall*, antè, Vol. XIII, p. 258, in this court, decided that an action could not be maintained for non-completion of an agreement for the sale of a ship, where the agreement failed to comply with the registry acts by recital of the register; and courts of equity have acted on the same rule in the case of applications for specific performance: but that is not the point my Brother Williams puts; it is, whether a court of equity would, the advance having been re-paid, restore the parties to their original position.] The transaction in this case, it is submitted, amounts to an absolute parting with the ownership by Mr. Brandeis, and an absolute vesting of it in the defendant. This court in *Duncan v. Tindall* recognise the cases in equity which support this doctrine, viz. *Hughes v. Morris*, 2 De Gex, M'Naghton, & Gordon, 349, before Vice-Chancellor Knight Bruce, and *M'Calmont v. Rankin*, 2 De Gex, M'N. & G. 403, before Lord St. Leonards. The case of *Follett v. Delany*, 2 De Gex & S. 235,—cited in Abbott on Shipping, 9th edit. p. 61,—also supports this view. There, a purchaser to whom a bill of sale had been executed, but was not to be handed to him until he paid the consideration

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money, obtained possession of it, got the ship registered in his own name, and then returned the deed, saying that he could not comply with the terms. On demurrer to a bill for the delivery up of the certificate, and for an injunction to restrain the vessel from sailing, the Vice-Chancellor (Knight Bruce) allowed the demurrer, on the ground that the bill of sale was executed as a complete instrument, and that, being entered in the book of registry, it was valid and effectual to all intents and purposes. The case is again referred to in Abbott, p. 72, where it is said: "Where the vendee of a ship, to whom a bill of sale had been executed, took it away at a time when by the express terms of the condition of sale he was not entitled to it, and had it registered, and caused an indorsement to be made on the certificate,—a court of equity refused to cause the delivery up of the certificate, although the bill alleged fraud." [*Jervis*, C. J. What was the ground of that decision?] That the registry act was conclusive. It has been put by the courts of equity upon this ground,—that the present registry act having a provision by which the mortgagee may be made perfectly safe, they will not assist parties who choose to evade that provision. [*Jervis*, C. J. That is purely a technical ground.] In *Jackson v. Vernon*, 1 H. Blac. 114, it was held that a mortgagee of a ship not in actual possession, was not liable for the ship's debts: but the ground of the decision is there put by Wilson, J.: "The owners of a ship are liable for furniture and necessaries, because they receive the immediate benefit of the freight; and it is for that reason the contracts of the captain are binding upon them, he being their agent or servant. But the cases which have established this to be law, do not affect a mortgagee not in possession, who cannot be considered as an owner nor as such entitled to the freight. The case of *Chinne v. Blackburne* was decided on the ground that, as a mo

gagee out of possession was not liable to the charges of the ship, so he was not entitled to the freight." Here, the defendant, not content with the ordinary mortgage security,—which would contain a covenant to re-pay the advance, and a corresponding covenant to re-transfer the ship on payment of the sums advanced,—takes a security which makes him the absolute owner as well in equity as at law. His debt upon the note was gone; the consideration being merged in a specialty of a higher order, assumpsit would not lie on it. It was necessary, therefore, for his perfect security, that he should be clothed with the real ownership. It would be more correct, perhaps, to say that the original debt was satisfied by payment. [Crowder, J. Then the bill of sale was not a collateral security, as described in the letter of the 1st of August, 1851? Jervis, C. J. How can the transaction amount to payment, when by express stipulation the interest on the 1000*l.* note was still running? That clearly was not the intention of the parties.] They might have had reasons of their own for the course they adopted. The principle contended for is further illustrated by the case of *Briggs v. Wilkinson*, 7 B. & C. 30, 9 D. & R. 871, where Bayley, J., says: "Where a ship is under the management of the master, and the owners divide the profits, the master is *primâ facie* agent for them all; but the mere legal ownership does not make any person liable for the ship's debts. *Chinnery v. Blackburne* is the first case on this point; and there the court seem to have considered, that, if a mortgagee were entitled to the profits of the ship, he would be liable to the debts." [Williams, J. That case was under the old act. The mortgagee is not entitled to the profits of the ship, if they are not needed for payment of his debt; but, if they are needed, he is.] In *Reeve v. Davis*, 1 Ad. & E. 812, 3 N. & M. 873, Littledale, J., says: "The rule is, that, upon a general order for repairs given by

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the captain, the party executing them has the security of the ship, of the captain, and of the owners : but, in an action against parties as owners, the question is, who are so for this purpose? The persons registered are not necessarily so ; the register acts were not passed for this purpose ; and the question of ownership, as it regards the liability for repairs, must be considered as it would have been before those acts passed. Nor is there, on this view of the subject, any hardship thrown upon the tradesman : he has always the means of knowing who are substantially the owners, by asking the captain to shew the charterparty : if this is refused, he may decline dealing. In this case the benefit of what was done enured to Thompson. (a) *The party for whose profit the ship is in reality employed at the time, has the benefit of the work done on board, and is liable to the tradesman who does it.*" In the present case, Mr. Brandeis had divested himself of all rights as owner, and the legal ownership, as also the right to the profits of the ship, were completely and irrevocably vested in the defendant. [*Jervis*, C. J. For whose profit, in point of fact, were the contracts in question made? Was it not for that of the party who was entitled to the possession of the ship after the re-payment of the 1000*l.* and interest,—the substantial owner?] It is submitted that the defendant, under the circumstances disclosed in this case, was the substantial owner. The letter of the 1st of August, 1851, cannot control the legal and equitable effect of the registry, coupled with the fact that every thing was done to vest the real title in the defendant under the registry act, and done wilfully and for the avowed purpose of vesting in him the perfect right to the ship and her earnings. [*Crowder*, J. Suppose the bill of sale had not been registered, would you have contended that that

(a) Who was not the registered owner.

which took place between the parties passed the property in the ship?] The act of registering the bill of sale amounted to an acceptance by the defendant of the transfer. The absence of the ceremony of registration might present the case in a different aspect.

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Honyman (with whom was *Bramwell*), for the defendant. (a) There are two points for the consideration of the court in this case,—first, who was the real owner of the *Celt* at the time the contracts in question were entered into by the master (for the purpose of ascertaining which the court will look at what is the real nature of the transaction),—secondly, whether, assuming the present defendant to be the owner in law and in fact, he is liable on a contract made by agents abroad acting under authority of the former owner. As to the second point, the real question is, who made the contract? As to the first point, the facts disclosed by the special case are clear and intelligible. Mr. Brandeis's letter of the 1st of August, 1851, places the transaction between the parties beyond the possibility of doubt. He writes,—“You have this day given me your acceptance for 1000*l.*, at six months' date, against the inward freight of my barque, the *Celt*, Captain Leith, which vessel I am expecting will load home from one or more ports on the west coast of America in the Pacific: and it is under-

(a) The points for argument on the part of the defendant, were,—

“That no liability attaches to the person in whom the property of a vessel is for the time being vested, for contracts made by the person who for the time being has the care and direction of the vessel: That, here, the master and

agents abroad acted for the person who employed the former, and not for the defendant: That *Pickard v. Sears*, 6 Ad. & E. 469, 2 N. & P. 488, is inapplicable; And that the special case shews no cause of action, no contract between the plaintiffs and defendant, and no wrong done by the latter to the former.”

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stood she is to be consigned to you inwards on arrival, and you are to reimburse yourself from her inward freight accordingly. Meanwhile, *as collateral security*, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due payment to you of the above-mentioned sum of 1000*l.*, *the vessel is to be again returned to me.*" In the face of that letter, the court is asked to find as a fact that the defendant is the substantial legal owner of the vessel, absolutely entitled to all the ship's earnings, and subject to all her engagements and liabilities. It is clear beyond all question, that Mr. Brandeis never ceased to be the real owner, and that the 1000*l.* was to be a mere charge upon the ship. As to the equitable doctrine suggested on the part of the plaintiffs, there is no real foundation for it. It would be strange, indeed, if a court of equity, upon such a state of facts as here disclosed, should hold a party entitled to retain a ship worth with her freight probably 7000*l.*, for an advance of 1000*l.* only. The statement of the case removes all doubt that might arise from the master's having been held out to the world, or to the plaintiffs, as the defendant's agent; for, it is found as a fact that they were wholly ignorant of the defendant's interest in the vessel at the time of making the contract in question. In a note to *Chinnery v. Blackman*, 3 Dougl. 391, 395 (a), it is said: "It is now decided that the mere legal ownership of the vessel does not make the party liable for the ship's debts; and the proper question in such cases is,—were the repairs done or the goods supplied on the credit of the legal owner?" And the following cases are referred to: *Jackson v. Vernon*, 1 H. Blac. 114, *Westerdell v. Dale*, 7 T. R. 306, *Young v. Brander*, 8 East, 10, *M'Ivor v.*

(a) S. C. nom. *Chinnery v.* This note was not published
Blackburne, 1 H. Blac. 117, n. until the year 1831.

Humble, 16 East, 169, *Jennings v. Griffiths*, R. & M. 42, *Harrington v. Fry*, 2 Bingh. 179, 9 J. B. Moore, 344, 1 C. & P. 289, R. & M. 90, *Cox v. Reid*, R. & M. 199, 1 C. & P. 602, *Briggs v. Wilkinson*, 7 B. & C. 30, 9 D. & R. 871, and Abbott on Shipping, 5th edit. p. 17. [*Jervis*, C. J. That was the law, as generally understood, at that time. It was afterwards altered. But now the original notion is very properly revived. The registry acts are now considered as having been enacted alio intuitu, for the regulation of the mercantile marine. This is a question of contract.] Precisely so, The true question is, was the contract made by the defendant, or by one acting as his agent and by his authority? Here, the facts shew that the captain was not the agent of the defendant for the purpose of making the contract in respect of which it is sought to charge him.

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Tomlinson, in reply. If this were the ordinary case of a purchase of a ship, the purchaser would beyond all doubt take the ship with all her liabilities, and subject to the contracts entered into by the captain for the purposes of the voyage upon which she might happen to be engaged. [*Jervis*, C. J. When a man buys a ship which is out on a trading voyage as a seeking ship, he intends to become absolute owner, and that the home freight shall be earned for his benefit; and, of course, in that case, he adopts the agency of the master. He adopts the agency, because he intends to adopt those acts which are done for his benefit. But, what pretence is there in this case for saying that the defendant intended to adopt the agency of the captain?] The facts shew that Mr. Brandeis intended to give Mr. Willis the option to take a collateral security for his advance, or to take upon himself, by registering the bill of sale, the absolute legal ownership of the vessel, and so to entitle himself to the homeward freight. [*Williams*, J. Do you mean to contend, that, if this case had been before

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a jury, it would have been the duty of the judge to leave it to them, upon the facts, to say whether or not they would infer that the transferee authorised the master to act on his behalf, as his agent,—or do you say that the authority emanates as a matter of law from the position of the parties?] Both positions are relied on. [Crowder, J. How could the question of authority be left to the jury, if it is a legal consequence?] The defendant has chosen to put himself in a position whence the law will imply a legal liability in him for the acts of the master. By registering the ship in his own name, he avoided all difficulty as to reputed ownership in the event of Mr. Brandeis becoming bankrupt: *Boyson v. Gibson*, ante, Vol. IV, p. 121. There, a British ship, registered under the 3 & 4 W. 4, c. 55, was conveyed by A., the registered owner, to B., for a valuable consideration, by a bill of sale executed before, but not registered until after, the bankruptcy of A.: and it was held that B. thereby acquired no property in the ship, but that it passed to A.'s assignees,—the effect of the statute being, that, until registration, every disposition by the act of the vendor, or of the law, is as effectual as if the unregistered deed had not existed, and is not defeated by subsequent registration, whether such intermediate disposition be one which requires registration, and is registered, or one which does not require registration. Maule, J., in delivering the judgment of the court, there says,—“The general intention of the act is, to prevent the property in British ships being held by any others than those whose title appears on the register: and this will be best effectuated by treating a bill of sale as not in legal existence till registered.” Knowing the law, and intending to make his security effectual, the defendant here has so dealt with the bill of sale, with the assent of Mr. Brandeis, as to completely vest the title, legal as well as equitable, of the ship in himself. He has clothed himself with the right to sue in his own name in respect of contracts made for the ship's benefit

by the master, and he is clearly bound by the master's acts and by his contracts.

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JERVIS, C. J. It seems to me that our judgment in this case ought to be for the defendant. It is admitted that the law is now different from what it was formerly supposed to be upon this subject. For a long time, the courts, and parties interested in these questions, were in the habit of looking to the register, and to the register only; and that was considered, without more, to be absolutely conclusive as to ownership, and consequently conclusive of liability on the part of the person who so appeared as owner. But it has now been comparatively long settled, that this, like every other case, depends on contract; and that the question is, with whom was the contract made: and that depends upon another question, now very well understood, viz. whether the master was the agent of the party sought to be fixed with liability in respect of a contract made by him. It is admitted, that, where the party is mortgagee of the ship only, taking merely the security of the ship, without intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and by subsequently entering upon the possession entitling himself to the earnings of the ship, will not make the master his agent so as to bind him in respect of contracts entered into by him as master after the date of the mortgage: not because he is not entitled to the profits, as is said to be the reason in some of the older cases; but because, applying the modern doctrine of principal and agent, it never was the intention of the mortgagee when he took the security of the vessel, to adopt the master as his agent so as to be liable for contracts made by him. It is now well understood that we are not bound by the register, but may look at the real transaction between the parties, in order to ascertain

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whether that which appears to be a legal title in a particular person,—the person registered as owner,—is or is not a legal title. That being so, we must look at the facts stated on the face of this special case, and see what was the real intention of the parties. It seems to me to be perfectly plain,—whatever may be the rule in courts of equity, as to which I will say a word immediately,—that the parties did not intend that Mr. Willis, the defendant, should, for the consideration of 1000*l.*, become the owner of a vessel confessedly worth several thousands, and in the course of earning many hundreds more. But he has given to him a bill of sale, which gives him an inchoate title which may be perfected by registration, at his option, accompanied by a paper or collateral agreement shewing that, although he may on the register appear to be the owner, his title is defeasible on the re-payment of the 1000*l.* Applying, therefore, the rule as to the intention of the parties, is it not manifest that the defendant, who had an interest in the ship of the limited character I have described, never could have intended to adopt the master as his agent, and make himself liable for his acts? Mr. Tomlinson failed to answer the question which was put to him more than once by my Brothers Williams and Crowder during the argument, but was driven to go back to the old law, which he admitted at starting to be untenable, viz. that you are entitled to treat the register as conclusive as to ownership, because he says, that, though by the agreement of the parties as stated in the special case the court are to draw inferences of fact, the register being conclusive they are estopped by law from drawing an inference which stares them in the face, viz. that the defendant, though nominally the owner, in reality holds the vessel only as a security, intending to take upon himself no liability. But then Mr. Tomlinson says that the facts shew that the defendant is the legal owner,

and not only the owner in a court of law, but the substantial owner; and that, though in morality and honesty he may be bound to re-transfer the vessel to the former owner on being paid his 1000*l.*, and though possibly he will do so, yet there are no means of compelling him to do it. And for this he refers to a case of *Duncan v. Tindall*, antè, Vol. XIII, p. 258, where this court held that an action would not lie for the non-completion of a contract for the transfer of a ship, because the agreement did not recite the ship's register; and in which there are collected one or two equity cases, in which since the recent acts courts of equity have held that they will not enforce specific performance of a contract which is illegal and entered into in defiance of the act. That, however, is a very different thing from saying that they will not restore the party to the position in which he ought in equity and justice to be placed. One who in a court of equity seeks to enforce specific performance of a contract which had been entered into in violation of the provisions of an act of parliament, would stand in a very different position than Mr. Brandeis would be in if he went into a court of equity, and said,—“I and Mr. Willis have mutually concurred in treating as an absolute sale that which by agreement between us was in reality a mortgage, and, as I have re-paid him his advance, I pray to be restored to my original rights.” In that case there would not be the same technical difficulty. It would not be asking the court to aid in carrying into effect an illegal contract: on the contrary, it would rather seem to me to be inviting the court to interpose in order to prevent a violation of the act by the party who, having received back his advance, refuses to restore that which was intended to be held by him merely as a security for its re-payment. It seems to me,—though I speak with all deference when speculating upon what a court of equity would do,—that it would

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be very strange if the court should decline to lend its assistance under such circumstances. Indeed, if without the collateral agreement mentioned in the case it could be made out that one had in consideration of an advance of 1000*l.* obtained a document which transferred to him nominally the ownership of a vessel worth 5000*l.* or 6000*l.*, I cannot but think a court of equity would compel him to re-transfer the ship on his advance being re-paid him. Under the circumstances, I think the distinction I have pointed out is the correct one: and on these grounds I think we are entitled to look to the real state of the facts, to see what was the intention of the parties; and, so doing, the only inference I can draw from them, is, that it never was the intention of Mr. Willis to become the absolute owner of the ship, or to adopt the captain as his agent for the purpose of binding him in respect of contracts made by him in relation to the ship. I am therefore of opinion that the defendant is entitled to judgment.

WILLIAMS, J. I am of the same opinion. It seems to me to be unnecessary to pursue the inquiry suggested by Mr. Tomlinson, viz. whether, supposing, after the ship in question had been assigned to the defendant in the manner stated in the case, the advance for which the transfer was unquestionably intended between the parties to be a collateral security only, had been satisfied, the transferror, Mr. Brandeis, could in equity have enforced his remedy for a re-transfer; for, I entirely agree with my Lord Chief Justice, that, whatever might be the result of the inquiry, we are clearly at liberty to look at all the circumstances that are before us in this case, in order to ascertain whether the master had in point of law or of fact authority to bind the present defendant for the debts of the ship. That is in reality the only question for our consideration. It seems to

me that there is neither principle nor authority to warrant us in inferring as a matter of law, that, under the circumstances stated in this special case, the master could bind the defendant by any contract entered into by him in the course of the voyage. And, if I were to deal with it as matter of fact for a jury, I should decline to infer that the captain had any authority so to do. It is clear to my mind that there never was any such intention either on the part of Mr. Brandeis or on that of the defendant: and I think we should be doing great injustice if we were under the circumstances to imply an authority in the master to fix the defendant with any acts done by him in the management of the ship. I entirely agree with my Lord in the view which he has taken

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CROWDER, J. I also am of opinion that the defendant in this case is entitled to judgment. The case, I observe, states it to have been agreed that "the acts of the master shall be taken to have been such as would be binding upon the ship and such owner or owners as he had by law, under the circumstances mentioned in the the case, authority to bind." He had authority, to the extent which the master ordinarily has, to bind the person who was in point of fact really and substantially the owner of the vessel, and not merely the person who appeared on the register as the nominal owner. The case also states that "it is agreed that the court shall be at liberty to draw any inferences of fact which a jury might draw." It is clear, therefore, that it was the understanding of the parties that the register was not conclusive evidence of ownership, so as to render the individual therein named as owner liable for the acts and contracts of the master; but that the real facts and circumstances of the case were to be looked at. Now, when I look at the letter of the 1st of August, 1851,

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where the nature of the contract between the parties is clearly stated, I cannot entertain a doubt as to who was the real owner of this vessel, notwithstanding what took place at the time of the quasi mortgage. The language of that letter plainly shews what was the intention of the parties. Indeed, all the surrounding facts shew clearly that a sale of the ship could not have been contemplated. It never could have been meant that the property in a ship worth at the very least 3000*l.* or 4000*l.* should pass from Mr. Brandeis to Mr. Willis for 1000*l.* We cannot infer anything so unreasonable. Speaking of the freight, the writer of that letter says that "it is understood the vessel is to be consigned to you (Willis & Co.) inwards on arrival; and you are to reimburse yourselves from the inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered." And mark what follows,—“and, on the return of the vessel to this country, and the due re-payment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me.” Can anybody who is to draw an inference of fact from such a transaction as this, entertain a doubt as to what was meant by the parties? Was it intended to operate a change of ownership? Substantially it was a mortgage transaction,—not a mortgage in the ordinary way; but the party who advanced the money was to assume the temporary appearance of ownership of the vessel, for the collateral purpose of securing the re-payment of his advance; and I apprehend he would be bound to re-transfer the vessel on being so re-paid. I, like my Lord and my learned Brother, abstain from inquiring what a court of equity would do under such a state of circumstances, though I own I am very strongly inclined to think, that, if the 1000*l.* were re-paid, it would decree a re-conveyance of the vessel. I do not, however, without further time to

look into the authorities, feel competent to give any opinion upon the subject. But, for the reasons I have stated, I arrive at the conclusion that the defendant is not liable as owner in this case, and consequently that the judgment of the court ought be in his favour.

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WILLES, J., had been engaged as counsel in the cause, and therefore took no part in the discussion. (a)

Judgment for the defendant. (b)

(a) But see the next case, where his opinion upon the general question is given. (b) The plaintiffs have given notice of appeal.

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Nov. 14.

IN this case, like *Myers v. Willis*, antè, p. 77, it was sought to charge the defendant, as part-owner of a ship called the *Stratheden*, for work done to the vessel by the plaintiff, a ship-builder, to the amount of 1116*l.* 17*s.* 7*d.* between the 29th of August, and the 4th of December, 1852, which repairs, it appeared, had been ordered by one Lewis, who was the defendant's co-owner, and superintended by one Turner, the captain, and which were necessary in order to enable the ship to retain her class of *Æ. 1.*

The mere fact of a man's being registered as a part-owner of a ship does not give his co-owner, or the captain, or the brokers, authority to pledge his credit for necessary repairs.

The cause was tried before Jervis, C. J., at the sittings in London after Hilary Term last. It appeared that the *Stratheden* arrived in the port of London, from a voyage on which she had been absent about two years and three quarters, in June, 1852, very much out of repair; that, on her arrival, Messrs. Thompson & Co., who had for some years acted as the ship's brokers, by the direction of Lewis (who had always acted as the

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managing owner), and who was registered as owner of 56 64ths, the defendant being owner of the other eight, sent her to the plaintiff's dock for repair. *The order for the repairs was given by Lewis.* The repairs were commenced on the 29th of August; and on the 10th of September, the defendant gave notice to the plaintiff that he would not be responsible for them. It further appeared that Messrs. Thompson & Co. had, by the direction of both owners, paid the portage dues, including the wages of the crew, and had also paid off a bottomry-bond which had been charged upon the vessel.

On the part of the defendant, it was proved, that, immediately after the Stratheden's arrival, viz. on the 3rd of June, 1852, the defendant wrote to Lewis, to inform him that it was not his intention to sail her again, and to ask Lewis to purchase his shares; to which Lewis assented; but that agreement was not ultimately carried into effect. Finding that Lewis was getting the ship ready for another voyage, and incurring expense for repairs, the defendant gave the plaintiff the notice before mentioned, and, on the 20th of September, arrested the ship by process of the Admiralty Court, and took the usual security, viz. to the value of the vessel minus the repairs.

For the plaintiff it was insisted, that the defendant, as one of the registered owners, was, under the circumstances, liable for all the expenses incurred in repairing the ship, or, at all events, for those incurred prior to the date of his notice.

For the defendant it was contended, that the fact of his being named as a co-owner in the register, was no evidence of his having authorised Lewis or the captain to pledge his credit for the repairs, and consequently that he was not liable for any part thereof.

Under the direction of the Lord Chief Justice, a verdict was found for the defendant,—leave being reserved

to the plaintiff to move that a verdict be entered for him for 1116*l.* 17*s.* 7*d.*, or for such other sum as Mr. Ritchie (Lloyds' surveyor) might under the direction of the court find to be due to him from the defendant.

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Shee, Serjt., in Easter Term last, obtained a rule nisi accordingly: but the argument was suspended for the result of the decision of the Exchequer Chamber in a case of *Mitcheson v. Oliver*, which involved the same question of law.

The case of *Mitcheson v. Oliver* having been disposed of in Trinity Term last, and the matter having again undergone discussion in this court, in *Myers v. Willis*, *antè*, p. 77,

Byles, Serjt., and *Cleasby*, now shewed cause. The recent case of *Mitcheson v. Oliver*, 1 Jurist, N. S. 900, has established,—restoring the law to what was formerly understood,—that the mere fact of a man's name being upon the ship's register as owner, does not make him liable for repairs ordered by the captain, unless it be shewn that the captain was authorised to act for him as his agent in the matter. Parke, B., in giving judgment in that case, says: "In the first part of the summing up, the Lord Chief Justice (Lord Campbell) stated to the jury 'that the defendant would not be liable to the plaintiff's demand merely as owner of the ship,'—that is perfectly correct; 'nor by reason of his being registered as such owner,'—that also is perfectly correct; 'nor would he be liable merely by the orders being given to the plaintiffs by the master of the ship,'—that again is perfectly correct; 'but that the defendant might be liable' (which must be a mistake for 'would be liable'), if all the facts were proved to have concurred which are stated: the Lord Chief Justice must have meant that

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the defendant would then be liable. We think that those are not all the circumstances necessary to make the defendant liable. The Lord Chief Justice afterwards states them: he said the defendant would be liable 'if he remained in possession of the ship,'—that is not enough; 'and held himself out as owner,'—that is not enough; because the owner, as owner, is not necessarily liable for the contracts of the master; 'and, if Thompson acted as master of the ship with his privity and consent,'—that is not enough, unless Thompson acted *as his* master. If he acted as master of the ship with his privity and consent, that is tantamount to a general authority to act on his behalf; therefore the Lord Chief Justice added, 'and if the goods and work were supplied to and done to the ship upon the credit of the owner, by the bonâ fide orders of the master, given with the privity of the owner, and if the goods and work were fit, necessary, and proper for the ship under the circumstances in which she was placed, and fit and necessary for the purposes of the ship at the time of the orders,' that then he would be liable. Now, it is not true, that, if all those circumstances concurred, a person who had the legal title to the ship would be liable: they would not be enough if he never held him out as *his* master of the ship, acting on his behalf in the conduct, management, and direction of the ship, and ordering the repairs. There is a defect in that part of the summing up, which may have misled the jury as to the conclusion to which they should come. It is true, that the Lord Chief Justice afterwards states the proposition in a more general form: and, if he had struck out the former part, and told the jury not to attend to that, it would have made a material difference, because he goes on to tell the jury they 'would consider whether, upon the evidence adduced on both sides, they were of opinion that the defendant had authorised the goods and work to be sup-

plied and done on his credit.' As a detached question, that is perfectly correct." The only distinction between that case and the present, is, that there the order for the repairs was given by the master; here, by the co-owner. [*Crowder, J. Myers v. Willis* was not a case of co-owners.] There is in truth no difference between joint-ownership of a ship and joint-ownership of an estate or of any other description of property: it is in all cases a mere question of authority. It may be doubted if the fact of a party's being on the register is even *prima facie* evidence of ownership. The register acts were passed with a totally different view. Not only was there in this case no evidence of authority in Lewis to bind Howard, there was an express repudiation of authority. *Curling v. Robertson*, 7 M. & G. 336, 8 Scott, N. R. 12, is in point.

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Shee, Serjt., and *Lush*, in support of the rule. As between part-owners of a ship, one has authority to bind the others in respect of repairs and other necessities for the ship, unless such authority be expressly excluded by agreement *inter se*, and that exclusion of authority is communicated to the party with whom the contract is made. For this there is abundant authority. In *Abbott on Shipping*, 8th edit. p. 105, it is said, that "with regard to the repairs of a ship and other necessities for the employment of it, one part-owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against." For this *Ex parte Bland*, *In re Strickland*, 2 Rose, B. C. 91, is referred to, where Lord Eldon says: "Where the repairs are ordered by the master, he, in the first place, incurs a personal liability; and, considering him in general as the servant or agent of the owners in the employment and management of the ship, they also

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become responsible for his orders, unless they are expressly excluded by the terms of the contract. The same observation applies to the case where a part-owner gives the order; the liability attaches against them all, unless it be expressly provided against;”—meaning, of course, by communication with the tradesman, or it will not avail. So, in Story on Agency, Ch. 4, § 40, 4th edit. p. 46, it is said: “In cases of part-owners of ships, there is some peculiarity in the law, growing out of the necessary adaptations of it to the exigencies and conveniences of commerce. Part-owners of ships are tenants in common, holding distinct but undivided interests; and each is deemed the agent of the others, as to ordinary repairs, employments, and business of the ship, in the absence of any known dissent. But, if any part-owner dissents, the others cannot bind his interest by their acts as agents, at least where the other party has notice of the dissent. A majority of the owners in interest have, however, a right to employ the ship, in case the minority dissent; and they may appoint a master of the ship, notwithstanding such dissent. And the master so appointed will, *virtute officii*, become entitled to bind all the owners by his acts in the ordinary business of the ship, unless the party dealing with him has notice of such dissent, or the dissenting owners have, by proper proceedings in the court of Admiralty, placed themselves in a position not to be deemed owners for the voyage undertaken by the majority.” If the law were otherwise, it would be impracticable usefully to employ any ship. [*Williams, J.* Does the liability of a part-owner for repairs attach, even though he has no means of knowing where the ship is sent to for the purpose of being repaired?] Undoubtedly it does. [*Crowder, J.* Has a part-owner greater authority in this respect than the master?] It is not necessary to contend that he has. In *Mitcheson v. Oliver*, the

master was appointed by one who appeared on the register as sole owner. In *Gleadon v. Tinkler*, Holt, N. P. C. 586, A., B., and C. were part-owners in a ship. A. directed B. and C. not to order any repairs in their joint names, and informed them that he would no longer consider them as managing owners. Repairs were done in their joint names, upon the direction of the captain employed by B. and C.: and it was held that A. was jointly liable. [*Crowder, J.* Has not that been over-ruled?] It has not; nor is there any reason why it should be. (a) The Lord Chief Baron Richards there says,—“The plaintiffs had no notice given to them that Tinkler had discharged the other defendants from pledging their joint credit. One partner, by the necessary relation of law, may bind the other in matters relating to their common interest. A court of equity will sometimes interfere to restrain one partner from using the name of the firm in certain transactions. But in general he has this right.” [*Jervis, C. J.* The Chief Baron there assumes, contrary to received notions on the subject, that part-owners are *partners*.] Although not partners in the general sense, it does not follow that they may not be considered as partners while engaged in the management of the ship for profit. They become partners by entering into a new speculation for the employment of the ship. They are always treated as such when the accounts between them are adjusted in equity. In *Thompson v. Finden*, 4 C. P. 158, Tindal, C. J., says,—“The question is, whether, if goods are ordered by one joint-owner, the party furnishing them may not, if he finds them out, bring an action against the other owners: and I have no hesitation in saying that he may.” Here, the Stratheden arrived in London

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(a) *Gleadon v. Tinkler* is Pollock; nor is it noticed in not cited either in Abbott on the American editions of Ab- Shipping or in Maude & bott by Dr. Story.

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in June, 1852. She had long been dealt with by Lewis as managing owner. The defendant, who was in London when the ship came home, concurs with Lewis in giving directions to Thompson & Co., the brokers, to pay the port-charges and wages of the crew, and also to redeem the bottomry-bond, and then to "turn the ship round" for another voyage. [*Crowder, J.* There is no evidence here that the defendant knew of the order having been given for these repairs, until after they were commenced; and then he immediately repudiated Lewis's authority to bind him.] By the exercise of due diligence, he might have known of it earlier. There is no hardship in imposing this degree of responsibility upon a part-owner: he may at any time protect himself against improvident speculation on the part of his co-owners, by going to the Admiralty Court; in which case, the ship does not sail at his expense, neither does he participate in the profits. In a case of *Davis v. Johnson*, 4 Simons, 539, a part-owner of a ship, which had been let to the East India Company for a voyage to India, after the other part-owner had expended a large sum in repairing it and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part-owner to give security for his share: the ship afterwards sailed to India, and returned home: and it was held by Vice-Chancellor Shadwell, that the plaintiff "having taken security for the value of his share, was not entitled to participate in the profits of the (seventh) voyage but was to be charged with his share of the outfit and repairs of the ship incurred previous and up to the time of the arrest."

Then it is said that the presumption of authority in Lewis is rebutted by the defendant's express dissent, and also by the sale of his interest in the vessel to Lewis. Doubtless, if there had been a complete sale of the defendant's interest before the order given for the

repairs, it would be difficult to struggle against this verdict. [*Jervis*, C. J. The courts have now for some time held that you must look to the real situation of the parties. There need not be a *legal* sale; a simply parting with his interest equitably will do.] No doubt, if the defendant had ceased to be a part-owner, Lewis's authority to bind him would be at an end. *Curling v. Robertson*, 7 M. & G. 336, 8 Scott, N. R. 12, which is the strongest case that can be cited against the plaintiff, is clearly distinguishable from the present. There, the defendant's ownership had ceased before the order given for the repairs: the bill of sale, though dated after the completion of the repairs, was executed in pursuance of a previous contract which was complete so far as the assent of both parties could make it so. Here, however, there was no agreement, no price was ever fixed, and the proposal ultimately went off. [*Jervis*, C. J. It appears that Lewis agreed to take the defendant's shares; the price was not mentioned, because nobody seems to have asked about it.] As long as the co-ownership exists, there is a presumption of authority in the managing owner to pledge the credit of the others for repairs, which can only be rebutted by proof of notice to the tradesman, or by express agreement: *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, R. & M. 42.

JERVIS, C. J. I am of opinion that this rule should be discharged. I think it is now perfectly well understood that these and all similar cases depend upon the question, with whom was the contract made; and that again depends upon the question of principal and agent,—was the party who gave the order for the repairs the agent of the party sought to be charged? Before we consider that, it may be as well to understand what is the position of “part-owners” of a vessel. They may be partners generally, or partners in a particular adven-

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ture ; but that they are not necessarily partners, is clearly determined by the case of *Helme v. Smith*, 7 Bingh. 709, 5 M. & P. 744. A part-owner, therefore, has not a general authority to bind his co-owners : but the liability of a co-owner may result either from express authority or by implication ; for instance, he may so conduct himself as to have held himself out to the party contracted with as one upon whose credit the work was to be done,—as might have been the case here, if it had been shewn that the ship had been previously in Mr. Brodie's dock, sent there by Lewis, the managing owner, and repaired upon the joint credit of Lewis and the defendant : in that case, the ship being sent there again in the same way, by Lewis's order, the presumption would be,—unless he proved an express determination of Lewis's authority or agency,—that the defendant would be liable, as having held himself out as a person to be bound by the acts and contracts of Lewis with relation to the ship. But, the moment the authority is determined, you are no longer bound by the ship's register, but are entitled to look to the real circumstances and position of the parties, and to see whether or not the person who gave the order was in reality the agent of the party sought to be charged. In the present case, it appears, that, before the vessel was sent by Lewis to the plaintiff's dock, the defendant had come to the determination not to sail her any more, and had given Lewis notice to that effect ; and that Lewis, in answer, agreed to take the defendant's shares at a price, and stated that he would take upon himself the responsibility of the repairs : and from that moment any orders given by Lewis cease to be given with the defendant's authority. When, therefore, you look to the real transaction between the parties,—as it is admitted you may do,—you find a distinct intimation on the part of the defendant of an intention to countermand the *prima facie* autho-

rity of Lewis; and therefore his right to make contracts to bind his co-owner is at an end. The case is brought expressly within the principle of *Curling v. Robertson*; for, though in that case there was a subsequent payment by a bill of exchange, and a subsequent completion of the title, there was, at the time the order was given and the contract was made by which the defendant was sought to be fixed, nothing but a mere inchoate agreement for the sale of the vessel: and Tindal, C. J., very properly says you must look to the real position of the parties, to see whether there was any agency. Looking, therefore, at the principle recognised in that case, and seeing here no grounds for departing from it, I see no reason why he upon whom is cast the burthen of proving the liability of the party whom he seeks to charge, should be exempted from the operation of the ordinary rules of law. The only matter which has at all pressed upon my mind during this discussion,—and I have maturely considered the subject, and have long been prepared for the question which has now arisen,—is, the authority of Lord Tenterden, referred to by my Brother Shee, from which he would infer that something positive and express must be done to exclude the liability of a part-owner in a case of this sort. But the case put by Lord Tenterden I take to mean this,—that, where a ship goes into dock for the purpose of repair upon the general credit of the owners, and one of them either legally or in fact ceases to be a part-owner, he may continue liable together with the others for the work done upon her, unless he determines his liability by express notice to the tradesman. But, where there is no such holding out, there can be no necessity for notice, inasmuch as the liability never attached. If I am a part-owner jointly with two others, in equal shares, and I send the vessel into dock, unless my co-owners have by notice limited my authority, I fancy I am only incurring a

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liability to the extent of one third. Therefore, I think the explanation of Lord Tenterden's doctrine is this, that the authority of a part-owner to charge the credit of the others for necessary repairs, exists, and continues only until countermanded,—he is entitled, until he has notice to the contrary, to assume that he has authority to bind them: and a tradesman to whom a part-owner has been held out as having such authority, may in like manner assume it to continue until he has express notice that the authority has ceased. That, as it seems to me, amply satisfies Lord Tenterden's rule. Upon general principles, therefore, and considering that this case is to be determined on contract, and upon the question as to the authority of the party who made the contract, I think we are clearly warranted in saying here that the defendant had countermanded the authority of Lewis, and that Lewis gave the order for the repairs upon his own account only, and therefore that the verdict for the defendant ought to stand; because, before any interest which the defendant had in the vessel had been resumed, if it could be resumed, by the going off of the proposed bargain between himself and Lewis, the notice had been given to the plaintiff which would prevent his going on with the repairs upon the supposed liability of the defendant. For these reasons, I am of opinion that the rule should be discharged.

WILLIAMS, J. I am of the same opinion. It is well established that part-owners of a ship are not in the position of ordinary partners. It is true they resemble partners in respect of the concerns of the ship to this extent, that, generally speaking, all are liable for repairs and other necessary expenses which are shewn or may be presumed to have been incurred with their assent. But their position differs from that of ordinary partners in this, that the authority which one part-owner gives to

another to act as his agent is not an authority that is necessarily incident to their relation, as in the case of partners. It is in vain for a man to repudiate the authority of his partner to bind him by his contracts, unless that repudiation is communicated to those with whom the firm has dealings. There is no authority to shew that any such rule holds as to part-owners of a ship. The onus of making that out lay upon the plaintiff's counsel; and they have failed to do so. The only question here is, whether in point of fact the presumption of authority in Lewis to bind his co-owner by his contract with the plaintiff for the repair of the vessel, which would arise from their relative position, is or is not rebutted by the circumstances. I had for some time entertained considerable doubt whether this was so or not. But I am now satisfied that it is not. I think there was no authority in point of law, and none in point of fact, to make the defendant liable. Undoubtedly it might be that he had so conducted himself by previous dealings that the plaintiff might be justified in presuming that Lewis acted as his agent. There is no evidence at all here of any previous dealings, or proof of any circumstances from which it can be inferred that the defendant allowed Lewis to hold himself out in any way as his agent. After all, it comes to a mere question of fact; and that question I think must be decided in favour of the defendant.

CROWDER, J. I am entirely of the same opinion. The real question is, whether the defendant contracted, by himself or by his agent, with the plaintiff, for the repairs of this ship. There being no pretence for saying that he entered into any contract personally with the defendant, the question resolves itself into this, whether Lewis was his authorised agent in making the contract. It is contended that he was, because the defendant was a co-owner with him, and by some rule of law one

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co-owner of a ship may pledge the credit of the others for repairs and other neccessaries, not only where no authority for that purpose is expressly given, but even where the authority is expressly repudiated. My Brother Shee contends that one part-owner may bind his co-owners in any case, unless they give notice to the tradesman that they will not be so bound. I listened attentively to hear some authority cited for so startling a position. None was offered, except the passage in Abbott on Shipping, to which my Lord Chief Justice has adverted, and in the explanation of which I entirely concur with him. It is unnecessary, therefore, to say anything further upon that point. It has been argued that the same rule applies in the case of part-owners, with respect to the power of one to pledge the credit of his co-owners, as exists in the case of ordinary partners : and for this the case of *Gleadon v. Tinkler*, Holt, N. P. C. 586, was cited. That case, however, seems to me only to prove, that, where part-owners deal as partners in a particular adventure, which they may do, the ordinary rule which governs the rights and liabilities of partners attaches to them : and, in the case of ordinary partners, one may undoubtedly pledge the credit of the other, even against his consent, unless express notice of dissent is given to the party dealt with. But I do not find any where that the same rule obtains with respect to the authority of a co-owner of a vessel. Here, there was evidence of a distinct repudiation by the defendant of Lewis's authority to bind him. And, if it resolves itself into a question of law, no authority has been cited before us to shew that the simple existence of co-ownership gives power to one part-owner to pledge the credit of the others. I therefore think that the verdict for the defendant should stand.

WILLES, J. I am of the same opinion. The contention on the part of the plaintiff in this case has been

that the defendant is liable for the repairs done to the vessel in question upon the orders of Lewis, because at the time of the making of the contract no notice had been given to the plaintiff that Lewis had no authority in fact to bind his co-owner, although there was no evidence that Lewis had ever had any dealings with the plaintiff before. That, as it seems to me, is putting it on a higher ground even than the liability of ordinary partners with respect to each others' acts and contracts; because, where a party withdraws from an ordinary partnership, and a notice of dissolution is published in the London Gazette,—whether that notice comes to the knowledge of one with whom the other afterwards contracts, wrongfully using the name of the firm, or not,—the retiring partner incurs no responsibility. Therefore, although in the case of an ordinary partnership it is not necessary that the countermand of authority should be actually communicated to the tradesman, we are called upon to hold, that, in the case of co-owners of a ship, whose partnership is of a more limited character, it is necessary that there should be actual notice given, although the tradesman has had no previous dealings with the ship. Whether he would be liable or not if no notice were given, may be a very grave question, since the doctrine as to a party's holding himself out as a partner to the particular creditor. The question, then, comes to this, has Mr. Howard given authority to Lewis to pledge his credit for the repairs of this vessel, or has Howard done anything to lead Brodie to suppose that Lewis had such authority? It seems to me that there was no such authority in point of fact, nor anything in the conduct of Mr. Howard to justify Mr. Brodie in concluding that Howard was a contracting party.

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Rule discharged.

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Nov. 20.

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The mere fact of a man's being registered as a part-owner of a ship, under an absolute bill of sale, which is shewn aliunde to have been given only as a security for advances, does not give his co-owner, or the master (appointed by his co-owner), authority to pledge his credit for necessary repairs.

IN this case the plaintiff claimed 706*l.* 10*s.* 1*d.* for repairs done to a vessel of which the defendant appeared on the register to be the owner of 48/64ths.

The cause was tried before Jervis, C. J., at the sittings in London after Hilary Term last. The facts which appeared in evidence were as follows :—

The vessel had originally belonged to one Bertram, a merchant at Newcastle; and, in October, 1840, Bertram by an absolute bill of sale, which was afterwards registered, transferred to the defendant 48/64ths, the defendant giving Bertram at the same time a paper acknowledging that the transfer was made for the purpose of securing certain advances made and to be made by the defendant to Bertram. In November in the same year, the defendant, at the request of Bertram, transferred 16/64ths to one Turner, the money received from Turner being paid to Bertram; and, at the time the repairs in question were done, the defendant appeared on the register as owner of thirty-two, and Bertram and Turner each as owners of sixteen 64ths of the ship. In July, 1846, the vessel having arrived in the port of London in a damaged state, Barker, the master appointed by Bertram, took her to the plaintiff's yard at Rotherhithe, with a letter from Bertram, with whom the plaintiff had had previous dealings, and the vessel was thoroughly repaired, and the invoice made out and delivered to the master, stating the work to have been for "Captain Barker and owners," in the usual manner. Application was afterwards made by the plaintiff to Bertram for pay-

ment, and at Bertram's request a bill for the amount was drawn by the plaintiff and accepted by Bertram & Parkinson (his partner). This bill was dishonoured, and the amount proved (with the defendant's assent) under a fiat against Bertram & Parkinson: and in 1851 the present action was brought.

It appeared that Bertram had throughout been treated as the managing owner of the ship; and that the defendant had handed to Barker, the captain, a letter of instructions from Bertram.

Upon this evidence, it was insisted, on the part of the plaintiff, that the defendant was liable for repairs done under the contract with Bertram, his co-owner.

The Lord Chief Justice, however, directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for the sum claimed, if the court should think that the fact of his name appearing on the register as owner was evidence of ownership so as to charge him with Bertram's contract.

Hugh Hill, in Easter Term last, accordingly moved for a rule. He submitted, that, whether the order for repairs was given by the captain or by Bertram, the defendant was equally liable, being a joint owner of the vessel at the time. [*Cresswell*, J. The question is, whether the captain has power to make contracts to charge any person whose name appears on the register as owner. At one time, the register was considered to be conclusive evidence of ownership, in an action for repairs or for necessaries supplied to a ship. Now, it is not considered even *prima facie* evidence. *Jervis*, C. J. The register acts are mere matter of fiscal regulation. This question is now pending before the court of error, in *Mitchelson v. Oliver* (since reported in 1 Jurist, N. S. 900). The proper course, therefore, will be to grant a rule, and to

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suspend the argument until that case shall have been disposed of.]

A rule nisi having been granted,

Byles, Serjt., and *Griffiths*, now appeared to shew cause : but the court called on

Hugh Hill to sustain his rule. He, however, admitted that there was nothing to distinguish the case from *Myers v. Willis*, antè, p. 77, and consequently that his rule must be discharged.

Per Curiam.

Rule discharged.

THE MIDLAND RAILWAY COMPANY, Appellants ;

JOHN DAYKIN, Respondent.

Nov. 12.

A colt strayed from a field on to a public road abutting upon which was a yard not fenced from a railway, the gate of which was through the neglect of the company's servants left open. Whilst the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train:—Held, that the company were responsible.

A PLAINT in which the now respondent was the plaintiff, and the now appellants were the defendants, was duly entered in the county-court of Leicestershire, holden at Loughborough, and came on to be tried before J. D. B., Esq., judge of the said court, and a jury duly summoned and sworn, on the 9th of April, 1855. The plaint was as follows :—

“In the County Court of Leicestershire, at Loughborough.

“Between John Daykin, Plaintiff,
and

The Midland Railway Company, Defendants.

“This action is brought to recover the sum of 25*l.*, being the damages sustained by the plaintiff by the loss of a colt, the property of the plaintiff, and which said colt was killed on the defendants' railway on the 12th day of February, 1855, by the negligence and carelessness of

the defendants or their servants. Dated, this 29th of March, 1855: 1855.

“Jos. Inglesant,

“Attorney for the said plaintiff.

“To The Midland Railway Company, the above named defendants.”

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At the hearing of the case, the following facts were proved on the part of the plaintiff.

The colt in question was a nag colt rising two years old, and had never been handled or broken in, and was of the value of 25*l*. The colt had in some way escaped from a field in which it had been confined, and was straying upon a public road. Abutting upon the said road is a coal-yard, which is not fenced from the railway; and the only protection against accident which is afforded to any cattle being upon the said road consists in a gate opening from the road into the said coal-yard. It is the duty of the defendants to secure the said gate for the protection of any cattle lawfully being upon the said road. Notice having been given to the plaintiff's servants that the colt had strayed from the road into which it had escaped, into the coal-yard, and that it had been driven out of the coal-yard, and was then upon the road, the servants of the plaintiff went in pursuit of it, and found it upon the road. In bringing it back to the field from which it had strayed, it must be brought past the said gate. One of the plaintiff's servants went past the colt, and drove it back along the road towards the field from which it had escaped. The colt went gently till it approached the gate, which remained open, when it turned into the coal-yard, and thence upon the railway, when, a train passing, it was run over, and killed.

The colt, after it escaped from the field had not been in the possession of the plaintiff or his servants, unless the turning it upon the road, and driving it towards the

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field from which it had escaped, amounted to a re-taking of possession.

The counsel for the defendants contended that the company were bound to fence only against the adjoining owners and occupiers; and that the plaintiff was not by his servants properly occupying the road, for that the colt was straying; and that the defendants were not under these circumstances liable. The case of *The Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, antè, Vol. XIV, p. 213, was relied on. And he applied to the judge to nonsuit the plaintiff.

The judge declined to do so: and in summing up directed the jury, that, if they thought, that, by such turning and driving of the colt, the servants of the plaintiff had re-taken possession of him, the servants and the colt were lawfully in occupation of the road, and that their verdict should be for the plaintiff; but that, if they thought that such turning and driving did not amount to a re-taking of possession, their verdict ought to be for the defendants.

The jury found a verdict for the plaintiff, damages 25*l.*; and the defendants gave the requisite notice of appeal, as required by the statute.

The question was,—whether the judge misdirected the jury.

Phipson, for the appellants. The judge of the county-court should, it is submitted, have told the jury that the colt was not lawfully occupying the road, inasmuch as it was astray at the time of the accident. In the case of *The Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, antè, Vol. XIV, p. 213, where the question arose upon the 68th section of the 8 & 9 Vict. c. 20, by which railway companies are required to fence as between themselves and the occupiers of the

adjoining lands, this court, by a liberal construction of the statute, held that a highway was to be considered "adjoining land," and that persons lawfully using the road with cattle were to be considered "occupiers," within that provision. Without impugning the accuracy of that decision, it may be assumed that the court will not extend it. The question is whether the colt was lawfully using the road. [*Williams, J.* Why not?] It had strayed from the owner's field, and continued to be an estray at the time it escaped into the coal-yard. [*Jervis, C. J.* The owner's servants were driving it home.] Until actually reclaimed, the colt could not be said to be lawfully using the highway. [*Crowder, J.* The owner's servants were lawfully using the highway, by driving the colt along it. It was not necessary that they should have actually laid hands upon the animal.]

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Bovill, contra, was stopped by the court.

JERVIS, C. J. I think this case must be governed by the case cited. It appears that the colt had strayed from its owner's field, and that the owner's servants were in the act of driving it home, when by the negligence of the company's servants it got upon the railway. I can see no room for doubt that that was a lawful use of the highway.

The rest of the court concurring,

Appeal dismissed, with costs.

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It is not competent to a county-court judge, where he has once heard and disposed of an application for a new trial, to re-hear the case at a subsequent court.

THE GREAT NORTHERN RAILWAY COMPANY v. Mossop.

PROHIBITION. Lincolnshire, to wit. The Great Northern Railway Company, the plaintiffs in this suit, by J. L., their attorney, sue Benjamin Addenbroke Mossop, the defendant in this suit: For that, on the 25th of April, 1855, the now defendant prosecuted in the county-court of Lincolnshire, at Spalding, in that county, before E. C., Esq., then being judge of the said court, a certain plaint theretofore commenced by a certain summons issued out of the said court for an alleged debt or claim of 10l.; for that the then defendants, being carriers for hire, had been intrusted with four beasts of the then plaintiff, to be conveyed from Spalding, in the said county, to London, which beasts the then plaintiff alleged that the then defendants had accepted and taken in charge, the carriage thereof having been duly paid to them; yet that the then defendants had neglected and refused so to convey the said beasts, but had unlawfully placed the same in the common pinfold at Spalding aforesaid: and for that the then defendants had unlawfully and improperly refused to convey certain beasts of the then plaintiff, and detained the same: and in which said action the now defendant was the plaintiff, and the now plaintiffs were the defendants: And the plaintiffs say that the said plaint came on to be tried before the said E. C., Esq., the said judge of the said court, and a jury summoned at the then plaintiff's instance, on the 25th of April, 1855, when the then plaintiff appeared by A. P., his attorney, and the defendants appeared by W. H. A., Esq., barrister-at-law when a verdict was found for the then plaintiff and his witnesses: That, after the jury had delivered their

verdict, the said A. P. applied on behalf of the then plaintiff for a new trial, and stated as the ground of his application, that he was taken by surprise by the then defendants not producing a certain document which he alleged to be necessary for establishing the then plaintiff's case, for the production of which document no notice had been given or subpoena served by or on behalf of the then plaintiff, and which document had not been asked for by or on behalf of the then plaintiff, or any other party, during the said trial: That the said W. H. A., on the part of the then defendants, was heard in opposition to the said application for a new trial: after which the said A. P. replied; and the said judge, having fully considered the subject, refused to grant a new trial, and decided that no new trial should be had in the matter of the said claim; and the said judge afterwards awarded and ordered the sum of 8*l.* 0*s.* 4*d.* to be paid by the then plaintiff to the then defendants as and for their costs of the said action; and judgment for the then defendants was thereupon, on the day last aforesaid, duly entered up and recorded in the said court; which said sum of 8*l.* 0*s.* 4*d.* so awarded and ordered to be paid, and so entered up of record in the said court, was afterwards, on the 26th of April aforesaid, paid by the then plaintiff into court pursuant to the said award, order, and judgment, and was afterwards received out of the said court, less 1*s.* 8*d.* for the fees of the said court, by the then defendants, on the 28th of April, 1855: That, at a sitting of the said county-court, at Holbeach, in the said county of Lincoln, at a time subsequent to the day whereon the said judge had so considered and decided the said application for a new trial, and the entry of the said judgment of record as aforesaid, the said judge informed the said A. P. that he was dissatisfied with the said verdict, and his own aforesaid decision upon the application for a new trial of the said cause;

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and that, if the said A. P. would renew the application at the next sitting of the court, at Spalding, he the said judge would grant the same: That, afterwards, to wit, on the 5th of May, 1855, the plaintiffs were served with a notice, signed by the said A. P. on the part of the now defendant, of the now defendant's intention to apply to the said judge on the 16th of May, for a new trial in the said cause, on the ground of surprise: That, afterwards, at the said county-court holden at Spalding, before the said judge, on the said 16th of May, the said A. P., as the attorney for the now defendant, renewed his application for a new trial, on the same grounds as brought forward on the first application; and that the now plaintiffs, by one H. J., as their agent in that behalf, opposed the said application, and contended before the said judge that the said judge had already considered and decided the question, and could not entertain it again; but that, nevertheless, the said judge then ordered a new trial to be had on payment of costs: And that the now defendant is still proceeding with the said plaint, under and by virtue of the said order of the said judge, for a new trial; whereby the plaintiffs say they are prejudiced, and have sustained damage to the value of 20*l.*; and they pray that a writ of prohibition may issue to prohibit the now defendant from further proceeding in the said plaint and new trial.

Plea and demurrer.

And the defendant, by W. C., his attorney, says that the said judge did not refuse to grant a new trial, and decide that no new trial should be had in the matter of the said claim, nor was the said new trial ordered after an application for the same had been previously heard, considered, decided, and adjudicated upon, in manner and form as the plaintiffs have in that behalf in the declaration alleged; and of this the defendant puts himself upon the country &c.; whereupon the defendant prays that the said writ of prohibition may not issue.

And the defendant says that the said declaration is bad in substance; wherefore he prays that the said writ of prohibition may not issue.

The plaintiffs take issue on the defendant's plea, and pray that the said writ of prohibition may issue. (a)

And the plaintiffs say that the declaration is good in substance, and pray that the said writ of prohibition may issue.

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G. Hayes (with whom was *Miller*, Serjt.), in support of the demurrer. (b) The judge of the county-court, notwithstanding his refusal on the first occasion, had power to entertain the application for a new trial at the subsequent court. It is not like the ordinary case of a former judgment: and the order for payment, and the actual payment, of the costs, did not preclude the plaintiff below from applying at the next court. The question arises upon the construction of the 89th section of the county-court act, 9 & 10 Vict. c. 95, and No. 141 of the rules of practice framed in pursuance of the 12 & 13 Vict. c. 101, s. 12. The 89th section enacts "that every order and judgment in any court holden under this act, except as herein provided, shall be final and conclusive between the parties; but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or the defendant to the judgment of the court, and shall also in every case whatever have the power, if

(a) Upon the trial of the issue of fact, the jury found,—contrary to the evidence of the county-court judge himself,—that he *had* entertained the motion for a new trial on the 25th of April, and *had refused to grant it*.

(b) The point marked for

argument on the part of the defendant, was,—“That the judge of the county-court had jurisdiction to hear and adjudicate upon the application for a new trial, made on the 16th of May, notwithstanding the prior refusal to grant a new trial.”

1855. *he shall think fit, to order a new trial to be had, upon such terms as he shall think reasonable, and in the meantime to stay the proceedings.*" The 141st rule of practice provides that "an application for a new trial, or to set aside proceedings, *may be made and determined on the day of hearing*, if both parties are present, *or may be made at the first court held next after the expiration of twelve clear days from such day of hearing*; and the party intending to make such application shall, seven clear days before the holding of such court, deliver a notice in writing, signed by himself, his attorney, or agent, stating the grounds of his intended application, and also the court at which such application is proposed to be made, to the clerk, at his office, and give a similar notice to the opposite party, by serving the same personally on such party, or by leaving the same at his place of abode or business; and such notice shall not operate as a stay of proceedings, unless the judge shall otherwise order; and, if money be paid into court under any execution or order in the suit, the clerk shall retain the same, to abide the event of the application aforesaid; and, if no such application be made, the money shall, if required, be paid over to the party in whose favour the order was made, unless the judge shall otherwise order; and, if such application be not made at the court mentioned in the notice, no subsequent application for a new trial, or to set aside proceedings, shall be made, unless by leave of the judge, and on such terms as he shall think fit." The construction of that rule came before the court of Queen's Bench in *Carter v. Smith*, 4 Ellis & B. 696, where that court held that the rule of practice was directory only, and the judge's power to grant a new trial discretionary under the 9 & 10 Vict. c. 95, s. 89. [*Crowder, J.* How many times may the judge change his mind?] His power is analogous to the power to grant new trials in the superior courts: though the

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general rule precludes an application after the first four days of term, the court may in a proper case depart from it; and they may even, and frequently do, re-open rules after they are disposed of. [*Crowder, J.* It must at all events be within the term.] Even that is only a rule of practice, which may be dispensed with. In *Carter v. Smith*, it was contended, as it will be here, that "it could never be intended that an application for a new trial should be made at *any* time." But Lord Campbell said: "It may well have been trusted to the judge to regulate that according to his discretion: and the legislature, in stat. 9 & 10 Vict. c. 95, s. 89, seem studiously to give him that discretion." Suppose the judge from inadvertence misapprehends the case in which the application for a new trial is made,—would it not be competent to the party to come again and ask him to correct his erroneous decision? Many inconveniences would result from holding the judges so strictly as is proposed. [*Jervis, C. J.* And, on the other hand, there would be much inconvenience in too great laxity. What answer do you give to my Brother Crowder's question? How often may the judge review his discretion?] It may be answered in the language of Lord Campbell in the case cited. "I should be exceedingly sorry," says his Lordship, "if the judges were not intrusted with the discretion exercised in this case; a discretion which I have no doubt will be cautiously and well exercised. Stat. 9 & 10 Vict. c. 95, s. 89, in express terms gave the judge in every case whatever 'the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable.' He has, therefore, on a proper application, power *at any time* under this section. Then comes the rule of practice made under the statute 12 & 13 Vict. c. 101, s. 12: and of these rule 141 is relied upon. But that rule is in its terms directory, not imperative. In ordinary cases, the notice is to be given: and the

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judge does wrong if he exercises his discretionary power to dispense with it, unless sufficient cause is made out. But, if a sufficient cause is made out,—if it is shewn, for instance, that the notice was not served in consequence of inevitable accident, or it may be in consequence of a trick or contrivance on the other side,—it would be monstrous to say there was no power to dispense with it. It is a rule of practice; and, from its very nature, there is an implied exception, if sufficient cause be shewn to induce the judge to dispense with it.” [Jervis, C. J. That is a little begging the question. Has the statute given the county-court judge the discretion he has assumed to exercise here?] The 89th section gives him a general discretion, in the widest possible terms. And that discretion is not taken away or narrowed by the rule of practice. In *Jones v. Jones*, 5 D. & L. 628, which may be cited on the other side, what was done was done behind the back of the opposite party.

Byles, Serjt., contra. (a) When this case was before the court on the motion for a prohibition,—*Mossop v. The Great Northern Railway Company*, ante, Vol. XVI, p. 580, a very strong intimation of opinion was given, that the judge here had exceeded his jurisdiction. Whether an inferior court can without a legislative provision grant a new trial, is at the best extremely doubtful: see Tidd’s Practice, 9th edit. Vol. 2, p. 905. [Crowder, J., referred to *Cavil v. Burnaford*, 1 Burr.

(a) The points marked for argument on the part of the plaintiffs, were,—

“That the county-court judge, having once fully heard the motion for a new trial, considered all the facts, and adjudicated thereon, and the matter being concluded, he had no

authority to grant such new trial on the subsequent application, as stated in the declaration: and that his first decision was correct, and he ought not to have departed from that decision in the manner stated in the declaration.”

568.] At all events, a new trial having once been moved for, and formally refused, the matter is res judicata; the authority of the judge is gone. If such a course as this may be pursued at the end of a month, where is the limit? If the judge who heard the cause may do it, his successor may do it. The question which arose in *Carter v. Smith* was altogether different, and clearly does not justify the judge in deciding one thing to-day, and upon the same materials altering his decision to-morrow. Where a party moves for a new trial,—whether in a superior or in an inferior court,—he is bound to bring all his materials upon the first occasion. If the argument on the part of the defendant is right, the judge would be bound, and even compellable by mandamus, to hear the renewed application for a new trial. In a recent case before the Privy Council, where a native judge had heard and decided a matter which was brought before him, it was held that the succeeding judge had no jurisdiction to re-open it. *Jones v. Jones*, 5 D. & L. 628, is very much in point. In a plaint in the county-court, the defendants pleaded the statute of limitations, but without the notice required by the 19th rule framed by the judges under the 9 & 10 Vict. c. 95, s. 78. The plaintiff required an adjournment of the case, in order to answer the plea, which was granted, and the case adjourned to a subsequent day. On that day the case came on for hearing, and the defendants obtained a judgment in their favour, which was entered by the clerk of the county-court in the book kept for that purpose. The defendants then left the court. Some days afterwards, they received notice that the judge had rescinded his judgment, and that the case was adjourned for further hearing. They attended on the day named, and protested against any further hearing of the case. The judge, however, overruled their objection, and gave judgment for the plaintiff, on the ground that

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the plea of the statute of limitations on the former occasion had been improperly pleaded. On motion for a prohibition, Coleridge, J., held, that the county-court judge had no authority to rescind his former decision, in the absence of the defendants; that he had therefore acted without jurisdiction; and that a prohibition must go. Where the legislature intended that the judge should have power to rescind or alter his decisions, that power is given to him in express terms, as in the 100th section. The general intention of the statute was, that all orders and judgments should be final and conclusive: s. 89.

Hayes, in reply. The judge of the county-court clearly would not be bound to entertain a second application for a new trial: but he might in his discretion do so. This is in truth a mere question of practice.

JERVIS, C. J. I am of opinion that our judgment in this case must be for the plaintiffs. I must confess I thought the matter had been finally disposed of when it came before the court in the last term, when my Brothers Maule and Cresswell were so strongly of opinion, that the judge, after having once heard and decided upon the application for a new trial, was functus, and had no further authority to entertain it. I apprehend it to be plain, as a general rule, that an inferior court cannot grant new trials. To that there may be exceptions; though even that has been doubted by very competent authorities. It is clear, however, that the judges of the county-courts would have had no such power, but for the 89th section of the 9 & 10 Vict. 95. Now, what are the facts here? The case proceeded to judgment, and there is a decision in favour of the defendants. An application is then made by the plaintiff for a new trial. That application is refused, and

costs are paid. The suit is then at an end; it is practically out of court. The claim has been adjudicated upon: there is an end of the judge's jurisdiction. Having exhausted his power over the suit, what right had he to revive it? I think the prohibition must go.

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WILLIAMS, J. I do not attempt to disguise the fact that I arrive at the conclusion to which my Lord has arrived not without great difficulty. It is clear that the power of granting new trials is conferred upon the county-court judge by the statute: and it is equally clear that a new trial may be granted even after execution issued and executed. The difficulty I have felt, is, whether all questions as to how that power is to be exercised do not resolve themselves into matter of practice, to be regulated only by the discretion of the judge, and whether we are not bound to assume that his discretion will be properly exercised. Upon the whole, however, I defer to the opinions of my Brothers Maule and Cresswell, and think I ought not to feel any doubt. A new trial having been moved for and refused, the play ought to be considered as having been played out.

CROWDER, J. I am also of opinion that this matter was adjudicated upon and determined, and the power of the judge exhausted, before the second application to him for a new trial. It is of the utmost importance that parties should know when the litigation between them is at an end. If it is not at an end when judgment has been pronounced, execution executed, and an application for a new trial heard and disposed of, it would be exceedingly difficult to say when the suit may be considered as finally ended. It is said that this is a matter which ought to be left to the discretion of the judge; and reliance is placed upon the language of Lord Campbell in *Carter v. Smith*, 4 Ellis & B. 696.

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I cannot think, however, that that learned judge would sanction the notion of such an extensive discretion in the county-court judge as that which would enable him to entertain a motion for a new trial after the case has once already been fully heard before him and disposed of. I think it would be extremely dangerous to introduce so lax a practice into the proceedings of these courts. It is of the utmost importance that the decisions of all courts established for the administration of justice should be final and conclusive. I think the plaintiffs are entitled to judgment.

WILLES, J. The very object of instituting courts of justice, is, that litigation should be decided, and decided finally. That has been felt by all jurists. It is long since a reason was assigned why judgments should be considered final, and should not be ripped up again,—*Ne lites sint immortales, dum litantes sunt mortales*. Human life is not long enough to allow of matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that, when a matter has once become *res judicata*, there shall be an end of question about it. And this is especially necessary in the case of county-courts, which are principally intended to deal with matters of small amount. Of all others, it is manifest that they should have that most important of all attributes of a court of justice, viz. that their decisions should be final. And, when I turn to the 89th section of the statute, I find an enactment that "every order and judgment of any court holden under this act, except as herein provided, shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the court, and shall also

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in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the mean time to stay the proceedings." That is a power to be exercised, not with reference to interlocutory matters, but with reference to the final judgment, which, unless a new trial is granted, must be considered a settled matter. Immediately that the judge has exercised his discretion to grant or to refuse a new trial, the exception to the general rule is exhausted, and the general rule must prevail. The decision once pronounced, there ought to be an end of the matter; especially where the decision has been acted upon, and the fruits of the judgment reaped.

Judgment for the plaintiffs.

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GOLDHAM, Clerk, v. EDWARDS, Clerk.

Nov. 21.

THIS was an action by an incoming against an outgoing incumbent, for dilapidations to the parsonage-house and premises.

See the declaration, *antè*, Vol. XVI, p. 437.

The seventh plea stated, that, whilst the defendant was rector of Caldecot, and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of the Central London District School, and that the plaintiff

In an action by an incoming against an outgoing incumbent for dilapidations, the defendant pleaded an exchange of benefices between the plaintiff and himself "in their then state and con-

dition," with an agreement on the plaintiff's part not to call upon the defendant to pay for the repairs in the declaration mentioned. The plaintiff joined issue on this plea, and also demurred, and, a verdict having been found for him at the trial, the court upon a motion for judgment *non obstante veredicto*, held that the plea was good, inasmuch as it did not *necessarily* shew a simoniacal contract:—

Held, that, they were bound to put the same construction upon the plea when brought before them on the demurrer.

The defendant further pleaded, that, before the breach of duty alleged in the declaration, the plaintiff, otherwise than by the agreement in the foregoing plea mentioned, and not by deed, wholly and absolutely absolved, exonerated, and discharged the defendant from payment for the dilapidations:—Held, a bad plea.

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and the defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings in their then state and condition, and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them; that the said exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became successor to the defendant in the said rectory and vicarage, as in the declaration mentioned.

The ninth plea stated, that, before any or either of the said supposed breaches of duty in the declaration mentioned, the plaintiff, otherwise than by either of the agreements in the foregoing pleas mentioned, and not by deed, wholly and absolutely absolved, exonerated, and discharged the defendant from the payment of the said moneys, and every part thereof.

The plaintiff demurred to the seventh plea,—the objection in the margin being, “that the alleged terms of the exchange are simoniacal and void.”

He also demurred to the ninth plea,—the objection in the margin being, “that, if the alleged exoneration was before the plaintiff was successor, he was not in a position to exonerate, and if after, then that his right to be paid for dilapidations could not be discharged without deed, or without a consideration; and that, as no consideration is stated, none can be implied.”

The defendant joined in demurrer.

Unthank, in support of the demurrer. The seventh plea came under the consideration of the court, in the last term, upon a motion for judgment non obstante veredicto,—the plaintiff having, pursuant to the 80th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, taken issue thereon as well as demurred thereto,—when the court held the plea sufficient, inas-

much as it did not *necessarily* disclose a simoniacal contract. The court supported the plea on that occasion by intending that the dilapidations of the premises belonging to the plaintiff's benefice might have been equivalent or about equal in amount to those of the buildings belonging to the exchanged benefice, and therefore the parties might not have thought it worth while to go through the unnecessary form of a valuation and payment of the amount from the one to the other, when each would have to pay or expend substantially the same sum,—or that the dilapidations on either side were so insignificant in amount as to make it not worth the expense of surveyors to value them. Although that may be a very proper way of construing a plea where the question arises after verdict or pleading over, the same rule will not apply where the plea is demurred to. In such a case, no intendment is to be made in favour of the plea; on the contrary, its language is to be taken most strongly against the party pleading. [*Williams, J.* The distinction between a plea being helped by verdict and by pleading over, is a very nice one.] In the former case, every fair intendment is to be made in favour of the plea, because it must be assumed that the judge told the jury what it was necessary to prove to make it a good plea. [*Williams, J.* And when you plead over, what then?] Then the plea is to be construed as both parties have agreed to construe it. [*Willes, J.* This is a third case, the applicability of your principle to which I do not quite see. *Jervis, C. J.* I think it would be difficult to induce us to alter our former decision. The case was extremely well argued by my Brother Channell and Mr. T. Chambers: the whole subject was exhausted. And I must say I doubt the application of your principle of construction under the new principle of pleading.] If the court feel bound by the former decision, upon this demurrer, it will be useless to re-argue the case.

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IN THE COMMON PLEAS,

The ninth plea is clearly bad. The claim of the plaintiff had no existence until the exchange was made. At that moment the right of action vested: and it could not be divested except under seal, or by an accord and satisfaction. "Exoneration" will not do: the defendant must plead the accord, and shew it performed. [*Jervis*, C. J. The ninth plea is clearly bad.]

Day (for *T. Chambers*), contra. It does not appear on the face of the plea whether the exoneration took place before or after the exchange: it is consistent with the language, that it was preliminary to the agreement taking place. And, supposing it took place after the exchange, the plea may still be supported, on the authority of *King v. Gillett*, 7 M. & W. 55, where, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it was held to be a good plea, that, after the promise of the defendant, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. [*Jervis*, C. J. The cause of action accrued here instantly upon possession being given.] It is submitted that that is not so. [*Williams*, J. The defendant was bound to leave the parsonage-house and premises in repair.] Or to pay the amount of the dilapidations within a reasonable time: the declaration so alleges the defendant's duty. [*Williams*, J. The writ might have been issued the moment the exchange was completed.]

JERVIS, C. J. The ninth plea is clearly a bad one, and consequently the plaintiff is entitled to judgment thereon, as well as on the demurrer to the seventh plea.

The rest of the court concurring,

Judgment for the plaintiff.

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THE LANDS IMPROVEMENT COMPANY v. RICHMOND.

Nov. 19.

THIS was a special case stated for the opinion of the Court pursuant to a judge's order under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 42.

The plaintiffs were incorporated by "The Lands Improvement Company's Act, 1853;" and by "The Lands Improvement Company's Act, 1855," the provisions of the first-mentioned act were in some respects altered and amended.

On the 31st of July, 1855, an agreement was made between the plaintiffs and the defendant for the assignment by the plaintiffs to the defendant, in the manner prescribed by the said acts, of a rent-charge of 104*l.* 4*s.* 4*d.* per annum upon lands improved by the plaintiffs, which charge was executed by the inclosure commissioners under their hands and seal, after the passing and in accordance with the provisions of the said acts; and the defendant agreed to purchase and take such rent-charge, on a satisfactory title being made out by the plaintiffs.

The plaintiffs afterwards called on the defendant to fulfil his said contract: but the defendant declined, on the ground that the plaintiffs had not made out a satisfactory title in the particular case, upon which the question herein stated is submitted for the opinion of the court.

An action has been commenced by the plaintiffs against the defendant to recover damages for the breach of his contract; and it has been agreed that the question upon which the matter in difference between the parties depends should be stated for the opinion of the court.

The question is,—whether, when *a part only* of the land

Where a part only of the land charged under the Lands Improvement Company's Act, 1853 and 1855, is subject to a mortgage or other incumbrance, the charge executed under the authority of those acts has priority in respect of the *whole* amount of such charge over the mortgage or other incumbrance, until apportionment made by the inclosure commissioners under the 70th section of the first-mentioned act, so as to enable the person entitled to such charge to exercise his remedies under those acts as if no such mortgage or incumbrance existed.

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charged under the acts is subject to a mortgage or other incumbrance, the charge executed under the authority of the acts has priority in respect of the *whole* amount of such charge, over the mortgage or other incumbrance, *before apportionment made* by the inclosure commissioners, under the 70th section of the said first-mentioned act, so as to enable the person entitled to such charge to exercise his remedies under the acts, as if no such mortgage or incumbrance existed.

Upon the decision of the question by the court, judgment will be entered for the plaintiffs or the defendant, as the case may be, according to the terms of the said order.

Bovill (with whom was *H. Lloyd*), for the plaintiffs. The Lands Improvement Company was established in the year 1853, its object being to advance money for the improvement of land by drainage and otherwise, the money so advanced to be repaid with interest within a period of not less than fourteen or more than twenty-five years,—the whole to be under the control and superintendence of the Inclosure Commissioners for England and Wales, and the advance to be secured by a rent-charge which is to be recoverable in the same manner as rent-charges under the tithe-commutation acts. It will not be denied, that, where money is advanced by this company upon the security of lands the *whole* of which are under mortgage, the rent-charge executed pursuant to their acts has priority over the mortgage: but the question is, whether the like priority exists where *a part only* of the land charged is in mortgage. The question turns entirely upon the construction of two or three clauses of the company's acts,—the 16 & 17 Vict. c. cliv, passed in 1853, and the 18 & 19 Vict. c. lxxxiv, passed in 1855. By the 42nd section of the act of 1853, it was enacted that “the inclosure commissioners shall not make such provisional order * until notice has been

* As provided
 by s. 41.

given of the application for the same by advertisement published in two successive weeks in some newspaper circulating in the county or district in which the land proposed to be improved lies, and two months have elapsed from the publication of the second of such advertisements, nor until notice has been given in writing, where such lands are situate in England or Wales, [and *] to all persons interested in such lands, in remainder or reversion, *or as mortgagees*, who by reasonable inquiry shall be known by the company to be so interested, and, where the lands are situate in Scotland, to the nearest heir or heirs of entail not exceeding three, and to † mortgagees and holders of other heritable securities; in which notices respectively shall be particularly stated the maximum amount which it is proposed to apply to such improvements, and the greatest and least term over which it is proposed that the rent-charge shall be spread; and, in case any person having any estate in or charge on such land within such two months signify in writing to the commissioners his dissent from such application, stating therein the nature of his estate or charge, if any, in or on such land, the commissioners shall certify under their hands and seal such dissent to the landowner by whom the application was made, and also to the company, and shall not make such provisional order unless or until such dissent be withdrawn, or an order be made by the high court of Chancery in England, or by the court of session in Scotland, in manner by this act provided, authorising the commissioners to make such provisional order." That section is repealed by the 11th section of the act of 1855, and re-enacted in somewhat different terms, as follows:—"And, before any such provisional order as aforesaid shall be made by the inclosure commissioners, notice shall be given of the application for the same, as well by advertisement inserted in two successive weeks

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* Sic.

† "two" in the act.

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in some newspaper published in the county in which the land to be improved lies, or in some county adjoining thereto, as by a notice in writing given, where such lands are situate in England or Wales, to every person entitled to any estate in such land, *or any part thereof*, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance therein, and to the person or persons entitled to any mortgage upon such land, *or any part thereof*, who by reasonable inquiry shall be known to so interested,—and given, where such lands are situate in Scotland, to the nearest heir or heirs of entail not exceeding three, and to the holders of every heritable security on such lands appearing upon the records,—and in such advertisements and notices respectively shall be stated the maximum amount which it is proposed to apply to such improvements, and the greatest and least term over which it is proposed that the rent-charge should be spread; and the inclosure commissioners shall not make such provisional order until two months shall have elapsed from the publication of the second of such advertisements, and the services of such notices respectively; and, in case any person having an estate in or charge or security on such land shall within such two months signify in writing to the commissioners his dissent from such application, stating therein the nature of his estate in or charge or security on such land, the commissioners shall certify under their hands and seal such dissent to the landowner by whom the application was made, and also to the company, and shall not make such provisional order, unless or until such dissent be withdrawn, or an order be made by the high court of Chancery in England, or by the court of session in Scotland, in manner by the recited act provided, authorising the commissioners to make such provisional order.” These provisions shew the care the legislature has taken that all parties interested should

have notice of the intended charge, and an opportunity to dissent therefrom. Then, the 48th section of the act of 1853 enacted, that, "when a provisional order for charging any lands to be improved has been made, and the commissioners are satisfied that the works of improvement contracted to be executed have been properly executed, the commissioners shall execute a charge under their hands and seal upon the inheritance or fee of *the lands so improved*, or some sufficient part thereof, for the amount by the contract agreed to be charged on the land to be improved, or a proportional part of such amount, as the case may be, to be paid, with interest, to the company; and every such charge shall be by way of annuity or other periodical payment extending over a term of years to be fixed by the commissioners, and to commence from the time when the works shall have been executed to the satisfaction of the said commissioners, such term not to be less than fourteen years nor to exceed twenty-five years; and such charge shall be made according to the form in the schedule (C.) to the act annexed, or as near thereto as the circumstances of the case will admit, and shall be duly stamped for denoting payment of the proper ad valorem stamp-duty which would be payable on a mortgage for securing the like amount as the principal money thereby charged, and shall be called an absolute order; and a copy of every such charge shall be authenticated by the seal of the commissioners, and shall be kept by them, and such copy and any other copy thereof, authenticated by their seal, shall be evidence of the contents and purport of the original charge." That section also is repealed, and re-enacted by the 12th section of the act of 1855, in the following terms:—"When a provisional order for charging any lands to be improved has been made, and the commissioners are satisfied that the works of improvement

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contracted to be executed, or some part of such works have been properly executed, the commissioners shall execute a charge under their hands and seal upon the inheritance or fee of the lands improved, or to be improved, or some sufficient part thereof, for the whole amount by the contract agreed to be charged on the land to be improved, if all the works contracted for are so executed, or a proportional part of such amount if part only of such works are executed, as the case may be, to be paid, with interest, to the company; and every such charge shall be by way of periodical payment, extending over a term of years to be fixed by the commissioners, and to commence from the time when the works in respect of which the same was granted shall have been executed to the satisfaction of the said commissioners, such term not to be less than fourteen years, nor to exceed twenty-five years; and such periodical payment shall be and shall be expressed to be, as to part thereof, a repayment of a proportionate part of the money so lent according to the length of such term, and, as to the remainder thereof, a payment of interest upon such loan; and such charge shall be made according to the form in the schedule (B.) to this act annexed, or as near thereto as the circumstances of the case will admit, and shall be duly stamped for denoting payment of the proper ad valorem stamp-duty which would be payable on a mortgage for securing the like amount as the principal money thereby charged, and shall be called an absolute order; and a copy of every such charge shall be authenticated by the seal of the commissioners, and shall be kept by them; and such copy, and any copy thereof authenticated by their seal, shall be evidence of the contents and purport of the original charge: Provided always, that nothing in this section contained shall be held to imply that the periodical payments charged and payable

under the recited act were not respectively, as to part thereof, a re-payment of a proportionate part of the money so lent, according to the length of such term, and, as to the remainder thereof, a payment of interest on such loan, which the same are respectively hereby declared to be." Then comes the 51st section of the act of 1853, which is unrepealed except as to the proviso at the end, and which enacts, that, "when the inheritance or fee of any land is in pursuance of the act charged with any money, the company shall be entitled to, and shall have from the time from which such rent-charge shall commence and take effect, a charge upon such lands for the money ascertained and approved by the commissioners as aforesaid, with such interest as contracted for, not exceeding 5*l.* per cent. per annum, or, if there be not any contract as to the interest thereon, at the rate of 5*l.* per centum per annum; and such lands shall thenceforth be and continue liable to the payment of such charge, and such charge shall have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit-rents, chief-rents, feuduties, ground annuals, and other charges incident to tenure, and tithe commutation rent-charges and teinds, and any charges created or to be created under any act authorising advances of public money for drainage, respectively, if any." It is scarcely possible to conceive larger words to give priority than these,—a priority over all mortgages and other incumbrances. Then comes the proviso,—"Provided, that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the authority of this act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of such charge, to be ascertained and apportioned by the commissioners." If it stood there,

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it would seem, that, until the proportion was ascertained by the commissioners, the charge would override the whole. That proviso is repealed by the 14th section of the act of 1855, and instead thereof it is provided, "that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the authority of this or the recited act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of such charge, *when and so soon as the same shall be ascertained* under and pursuant to the 70th section of the recited act." It still, however, comes in by way of a proviso after the general enactment in s. 51 of the former act. Then comes the 70th section of the act of 1853, which enacts, that, "if it be at any time represented to the commissioners that the land charged under this act is occupied in separate farms or other holdings, or has become the property of separate owners, or that the owner thereof is entitled thereto under separate titles, or for distinct and separate interests, or is desirous to sell or dispose of a part of such land, or that part only of such land is subject to any mortgage or other incumbrance, or that for any other reason it would be desirable that such charge should be apportioned, the commissioners may, with the consent of the landowner, and of the company or other the party for the time being entitled to the charge, or the husband, guardian, tutor, curator, committee, or trustee of such party, if a married woman, infant, lunatic, or idiot, furious or fatuous persons, and of such other parties (if any) as the commissioners think right, by order under the seal of the commissioners, apportion such charge so that a separate and distinct charge may become charged on each separate farm or holding, or on the land of each landowner, or on the land held under each separate title, or for each

distinct and separate interest, or on the part or each part which the landowner is desirous to sell or dispose of, or on the part subject to such mortgage or other incumbrance, and the part intended to be retained by him, or on other separate parts of the lands, but so that any charge charged under such apportionment shall not be less than twenty shillings; and every such apportioned charge shall be recoverable in the manner as if the same had been originally charged under this act on the land on which the same is charged by such order, and shall for other the purposes of this act be deemed an original charge on such land; and after any such apportionment the land charged with an apportioned part of the original charge shall not be liable to any other part of the original charge; provided that in any case in which the person entitled to any such mortgage or other incumbrance shall satisfy the commissioners that he would be prejudiced unless such apportionment were made, the commissioners may, if they think right, make such apportionment without any such consent." The rent-charge was clearly intended to be the main and primary charge upon the whole estate; and, if there was to be any apportionment, the mortgagee or other incumbrancer was the party to procure it to be made. The 53rd section of the act of 1853 shews the operation of the charge: it enacts that "the execution by the commissioners of any charge on lands in pursuance of this act shall be, both at law and in equity, conclusive evidence, to all intents and purposes, of the contract to which such charge relates having been duly entered into by the proper parties, and of all acts and proceedings by this act directed with reference to or consequent on such contract having been duly had and done, and of such charge having been duly made and executed, and being a valid charge under this act on the inheritance of the

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Hannen, contrà. The true construction of these acts of parliament, it is submitted, is, to give the company a charge upon the lands improved for the money advanced, but not a *prior* charge as to that part of the land which is under mortgage, until an apportionment has been made. The earlier clauses of the act of 1853 having provided for the notices which are to be given to mortgagees and other incumbrancers who can by reasonable diligence be found, the legislature has by s. 51 declared what shall be the charge on the property, and that "such charge shall have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit-rents, &c." It is conceded that that, taken by itself, would give the company a complete charge upon the inheritance which would have priority as to the whole, over all mortgages. But then comes the proviso,—“Provided, that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the authority of this act shall have priority over the

mortgage or other incumbrance only to the extent of a due proportion of such charge, to be ascertained and apportioned by the commissioners." Now, the natural office of the proviso, is, to except something out of the operation of the previous part of the section. Under this proviso, the effect was, that, if a portion of the land upon which the money was advanced was under mortgage, the charge executed by the commissioners would be an absolute charge upon the whole estate, having an immediate priority for the entire charge as to the portion not mortgaged, and an uncertain and unascertained priority as to the portion mortgaged. The object of the proviso, as amended by s. 14 of the act of 1855, seems to have been, to do away with this unascertained priority; and this is attained by giving priority as to a due proportion "when and so soon as the same shall be ascertained." This is equivalent to "not before." Under the amended proviso, the effect is, that, up to the time of the apportionment, the commissioners have a charge for the *whole*, upon all the lands, including the portion mortgaged; but it is a *subsequent* charge as to that portion. [*Williams, J.* The 51st section seems to take it for granted that there will be an apportionment.] Probably. Then, the effect of s. 70, is, that, *when* the apportionment is made, the mortgaged land is not to be liable *at all* beyond the apportioned part of the charge. The subsequent charge for the whole ceases, and is converted into a prior charge for a part. The argument on the other side gives no effect whatever to the proviso; for, without it, s. 70 would have cut down the priority for the whole charge to a priority for the apportioned part only. [*Jervis, C. J.* You concede, that, where the whole estate is mortgaged, the rent-charge is to have priority?] Yes. That may be reasonable, because the money advanced is laid out upon the improvement of the whole. [*Jervis, C. J.*

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It does not follow that the money may not be laid out upon the whole, where a part only is mortgaged.] The construction contended for on the other side would lead to this injustice :—Suppose a landowner having an estate of a thousand acres, fifty only of which is in cultivation, and the rest waste, applies to the company for an advance of money to make the nine hundred and fifty acres of waste productive, and to complete certain improvements in the other fifty acres, and the fifty acres are under mortgage,—could the company charge the whole advance for the improvement of the waste upon the fifty acres, to the exclusion of the mortgage, of which they had full notice? The construction, on the other hand, for which the defendant contends, reconciles the interests of all persons. [*Crowder, J.* The proviso at the end of s. 70 shews that the mortgagee is the person to apply to the commissioners for an apportionment.] He may do so if the company do not; but the 33rd section of the act of 1853 shews clearly that the apportionment may be made on the motion of the company: it enacts that “any two or more landowners, with the consent of the inclosure commissioners, may join in entering into any such provisional contract as aforesaid with the company for the improvement of the lands of such landowners respectively; and the sum expended in the improvement executed under any such joint contract, or the charge to be made in respect thereof, shall be apportioned so that a separate and distinct sum or charge may become charged upon the land of each landowner in the manner hereinafter specified;” that is, as specified in s. 71, thus shewing that the company may act under that section in a case where there is no mortgage. Where there is a mortgage, either he or the company may obtain an apportionment. The 53rd section carries the matter no further: the execution of the charge by

the commissioners, is evidence of such charge being a valid charge under the act; but it leaves the question of the extent of the charge just where it was.

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Bovill, in reply. The works to be done must be for the permanent improvement of the land; all parties interested as mortgagees or otherwise are to have notice; and the inclosure commissioners are clothed with a power and a duty to see justice done to all. There can, therefore, be no hardship in making the charge created under the acts a first charge upon the land, the whole estate being benefited by the outlay. [*Williams*, J. But for the proviso upon which the question turns, scope might have been given for the greatest injustice. There might be no necessity for draining the part of the land which is mortgaged.] It is only the lands *improved* that can be charged: s. 48. [*Jervis*, C. J. That is not so: the charge is upon the whole farm: that was so under the Irish acts, upon the model of which these acts were framed] It is conceded that the charge has priority, where the whole is mortgaged. The company cannot obtain an apportionment without getting the consent of all parties: whereas, the mortgagee may obtain it without any consent at all. The 51st section of the act of 1853, it is submitted, in clear and express terms imposes the charge upon the whole inheritance and fee, and gives it priority over all other incumbrances; and that primary liability is only to be cut down by an apportionment procured by the mortgagee in the terms of the proviso in the 14th section of the act of 1855.

JERVIS, C. J. I must confess I have felt considerable embarrassment in arriving at the proper construction of these acts of parliament. But, after giving the matter the best consideration I am able, I have come to

1855. the conclusion that the plaintiffs are entitled to judgment. The object the statutes had in view, was, to enable the company to advance money for the improvement of lands, and to charge the estate with its repayment. The legislature have provided for giving the transaction the greatest possible notoriety, and have surrounded it with every possible check : notice is to be given by advertisement in the local newspapers, and the money is to be laid out under the inspection of the inclosure commissioners. The charge is (s. 48) to be imposed upon *the lands improved*,—directly and indirectly, I presume : and the 51st section enacts that the charge executed by the commissioners shall have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit-rents, &c.,—with a proviso, that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the authority of that act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of such charge, to be ascertained and apportioned by the commissioners. Mr. Hannen says, that, admitting that the enacting part of s. 51 makes the rent-charge under the act a *prior* charge, the effect of the proviso is to make it a *subsequent* charge as to so much of the land as may be incumbered, and a prior charge only after apportionment by the commissioners. On the other hand, Mr. Bovill contends, that, the object of the act being the improvement of the land, the 51st section gives the company a statutory title,—a prior charge upon the land generally, until the character of the charge is altered and the charge apportioned on the application of the mortgagees. And he relies on the substituted proviso given by the 14th section of the act of 1855,—“ that, in case a part only of the land charged

is subject to a mortgage or other incumbrance, the charge created under the authority of this or the recited act shall have priority over the mortgage or other incumbrance *only* to the extent of a due proportion of such charge, *when and so soon as* the same shall be ascertained under and pursuant to the 70th section of the recited act,"—treating the word "only" as giving a key to the construction. Looking at the general scope and object of the acts, I think that is the fair meaning of the proviso.

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WILLIAMS, J. I am of the same opinion. The question turns upon the construction of a few lines in two acts of parliament. The words are certainly not very clear: and I do not very well see what the legislature meant when they substituted the proviso in s. 14 of the act of 1855 for that in s. 51 of the former act. Having enacted that the charge created under the act shall have priority generally, they go on to provide for the case of a part only of the lands improved being subject to a mortgage or other incumbrance, and to declare that the newly created charge shall have priority only to the extent of a due proportion of such charge, to be ascertained and apportioned by the commissioners. I think the meaning of the proviso, as it originally stood, is, that the priority of the statutory charge is to be limited to a proportion to be ascertained,—contemplating a step to be taken in future, and leaving it doubtful whether it was to commence then or not. Then, the 14th section of the second act was inserted for the purpose of explaining the former act, and expressly enacts that the statutory charge is not to be confined to a proportion until a given event, viz. the ascertainment by the commissioners under s. 70 of the former act.

CROWDER, J. I am of the same opinion. The early

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part of s. 51 clearly shews that the charge under the act has priority over all mortgages affecting the lands improved. Then comes the proviso at the end of that section, which certainly is not free from difficulty. On the one hand, it might have been contended that the object of the proviso was to limit the extent of the priority in the former part of the clause: and, on the other hand, it might have been said that the priority of the charge created by the act was to be limited only when an apportionment by the commissioners should have taken place. Then comes the 14th section of the act of 1855, which makes a difference in the form of words. The words of that proviso are,—“that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under this or the recited act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of such charge, when and so soon as the same shall be ascertained under and pursuant to the 70th section of the recited act.” There being no other conceivable motive for thus changing the language, I think the intention of the legislature must have been to make the former provision clear and definite. So looking at the clause, it seems to me, that, in the case provided for, the charge was to operate as a prior charge to a limited extent only when and so soon as the apportionment should be made by the commissioners under s. 70 of the former act.

WILLES, J. I am of the same opinion. The earlier part of s. 51 makes all the land liable to the charge in priority. Then comes the proviso in favour of the mortgagee, where part of the estate was in mortgage. That left it somewhat ambiguous whether the proportion was to be ascertained at once by the commissioners, or, if not, whether it is to be relative. There is strong reason, as it seems to me, for saying, upon the first act

that the limitation was only to take place when *the mortgagee* put in force the provision contained in s. 70. The company could not have an apportionment without first obtaining the consent of all parties: whereas, the mortgagee might do so without obtaining the consent of any person at all. Then comes the 14th section of the act of 1855, which appears to me to make the matter plain. "When and so soon as" the apportionment is made by the commissioners, a certain result is to take place, viz. that the portion of the land which is in mortgage shall become liable to the proportion of the charge only as a first charge. That seems to me to reconcile both sections.

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Judgment for the plaintiffs.

RAPHAEL and Another v. THE GOVERNOR AND COMPANY
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Nov. 5.

THIS was an action brought by Messrs. Raphael, bullion and money dealers in London, suing upon the title of Victor St. Paul & Co., money-changers of Paris, to recover the amount of a bank-note for 500*l.* which had been stolen.

The declaration stated that the defendants, on the

One who takes a bank-note or other negotiable security *bonâ fide*,—that is, giving value for it, and having no notice at the time that the party from whom

he takes it has no title,—is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself.

A money-changer at Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, took one of the stolen notes (for 500*l.*) at Paris,—giving cash for it, less the current rate of exchange,—from a stranger, whom he merely required to produce his passport and write his name on the back of the note:—Held, that the circumstance of his forgetting or omitting to look for the notice was no evidence of *mala fides*.

Affidavits of jurymen, to the effect that they did not understand the answers given by their foreman to certain questions put to them, to amount to a finding for the plaintiff:—Held, inadmissible.

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29th of May, 1852, by their promissory note promised to pay one Mr. Matthew Marshall, or bearer, 500*l.* on demand; that the said note was then transferred and delivered to the plaintiffs, who thereby became and still were the lawful bearers thereof; and the defendants did not pay the same. There was a count for interest.

The defendants pleaded,—first (to the first count), that, after the making and issuing of the note, and before the plaintiffs became the bearers thereof, the same was feloniously stolen from certain persons using the name, style, and firm of Messrs. Brown, Shipley, & Co., and that the said note was then, and still is, the property of the said Messrs. Brown, Shipley, & Co.; that the plaintiffs were not nor are bonâ fide holders for value or consideration of the said note, and without notice or knowledge of the premises, and that the said plaintiffs were not nor are entitled to the said note, or to sue upon or enforce payment of the same; and that the defendants refused and still did refuse to pay the said note, at the request of the said Messrs. Brown, Shipley, & Co.

Secondly (to the first count), that the plaintiffs were the bearers of the note in the first count mentioned, and suing thereon as agents only and for and on behalf of one Victor St. Paul, and not otherwise, and that, after the making and issuing of the note, and before the said Victor St. Paul became the bearer thereof, the same was feloniously stolen from certain persons using the name, style, and firm of Messrs. Brown, Shipley, & Co., and that the said note was then, and still remained, the property of the said Messrs. Brown, Shipley, & Co.; that the said Victor St. Paul was not nor is a bonâ fide holder for value or consideration of the said note, and without notice or knowledge of the premises, and that the said Victor St. Paul was not nor is entitled to the said note, or to sue upon or enforce payment of the same; and that the defendants refused and still refuse to pay the

said note, at the request of Messrs. Brown, Shipley, & Co.

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Thirdly (to the residue of the declaration), never indebted. Issue thereon.

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The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence, or were admitted by the plaintiffs, were as follows:—

On the 13th of November, 1852, the bank-note in question, with four others of the like amount, and five notes for 100*l.* each, was stolen from a clerk in the employ of Messrs. Brown, Shipley, & Co., of Liverpool. Payment of the stolen notes was immediately stopped, and the loss advertised by means of hand-bills circulated in Liverpool, and also at Paris, and in London. There was some evidence to shew that one of these notices came to the hands of St. Paul in *April*, 1853.

St. Paul, who was called as a witness, stated, that he was a partner in the firm of St. Paul & Co., money-changers at Paris; that the house was in the habit of changing English bank-notes every day, frequently for very large sums; that the plaintiffs were their correspondents in London; that he recollected taking the 500*l.* note the subject of this action *on the 25th or 26th of June*, 1854, from a person who presented himself at their shop; that he asked him for his passport, which he produced, and required him to write his name and address on the note, and then gave him the value according to the course of exchange of the day, which was 24*s.* 95*c.*; that it was the practice of the house to file all notices of stolen or lost notes served upon them, and to look to them if the amount was important; but that, on this occasion, he did not look at the file, and had no recollection of the notice, or he would not have taken the note.

The learned judge left it to the jury to say,—first,

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whether St. Paul & Co. paid the value for the note,—secondly, whether the notice of the loss was served upon them,—thirdly, whether at the time of taking the note they had the means of knowing that it had been stolen,—fourthly, whether they took it bonâ fide.

The jury retired for about half an hour, and, on their return, the foreman, in answer to the above questions, said they found that St. Paul & Co. did give value for the note,—that they had notice of the robbery,—that they had no knowledge of the loss at the time they took the note, but that they had the means of knowledge if they had properly taken care of it,—and that they took the note bonâ fide.

His Lordship thereupon directed a verdict to be entered for the plaintiffs for 534*l*.

Bovill now moved for a new trial on the grounds of misdirection, that the verdict was against the weight of evidence, that on the finding of the jury the plaintiffs were not entitled to the verdict, and also upon affidavits by six of the jury denying their concurrence in the verdict as entered. [*Jervis*, C. J. Can we receive the affidavits of jurymen? *Straker v. Graham*, 4 M. & W. 721, 7 Dowl. 223; *Burgess v. Langley*, 6 Scott, N. R. 518.] Affidavits of jurymen cannot be received to shew what passes amongst themselves when out of court: but the court of Exchequer lay it down in *Roberts v. Hughes*, 7 M. & W. 399, that, “the rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room, or the grounds on which they found their verdict.” [*Jervis*, C. J. What do the jurymen say?] The first (and they are all in substance the same) states, that, after the evidence had been taken, and after the Lord Chief Justice had finished his summing up, the deponent and the other members of the jury retired to consider the verdict they

should give; that they had not arrived at a decision upon the verdict when himself and the other members of the jury returned into court for the purpose, as he understood and believed, of answering the following questions which had been put to them by the Lord Chief Justice, viz. first, was the money paid for the bank-note by Victor St. Paul? Secondly, was the notice of the robbery served? Thirdly, had Victor St. Paul at the time of the discount the means of knowing that the note was stolen? That no other answers to the questions proposed had been agreed upon by the jury, or considered by them; that they did not return into court for the purpose of delivering a verdict, but the verdict was, as the deponent understood, to be the subject of subsequent discussion and deliberation; that the deponent had not, nor had as he believed a very large majority of the jury, the intention of, nor did they concur in, finding a verdict for the plaintiffs; that the deponent was under the impression and belief during the whole of the time after the return of the jury into court, and during the time the foreman was being spoken to by the Lord Chief Justice, that he was answering the questions put by the Lord Chief Justice as they had agreed, and that, upon such questions being answered, they should be further instructed as to finding the verdict; that such his (deponent's) impression and belief continued until the Lord Chief Justice declared the verdict to be for the plaintiffs, at which the deponent audibly expressed his dissent while in the jury box; that the deponent's conviction, and, as he believed, the conviction of the large majority of his brother jurors, was, that the conduct of Victor St. Paul & Co. had not been such as to entitle them to the property in the said bank-note; that, if he had believed or suspected that the foreman of the jury, by answering any question of the Lord Chief Justice after the return of the jury into court, as to bonâ fide conduct of Victor

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St. Paul & Co. with regard to cashing the said bank-note after notice,—and which question of bona fides had not been determined upon by the jury,—was expressing the opinion of the jury, or was to be considered in that light, and thereby giving in effect the verdict for the plaintiffs, he would at once have refused his concurrence in any such answer, because he was not, nor, as the deponent believed, were a considerable majority of the jury, prepared to concur in an opinion that Victor St. Paul & Co.'s conduct in cashing the note after notice of the robbery, was such as to entitle the plaintiffs to the property in the note; and that, in consequence of his finding that the verdict had been entered for the plaintiffs, against his own view of the case, and his conviction of what was right, and what was intended by himself and a large proportion of the jury, he thought it right the day after the trial to put himself in communication with the deputy-alderman of the ward in which he carried on his business of a merchant in the city of London, with the hope that some measures would be taken to rectify the wrong which he considered had been done by the entry of the verdict for the plaintiffs. [*Jervis*, C. J. A man who could make out such an affidavit as that, is utterly unfit to be a juryman. It shews that the jury thought St. Paul had acted *bonâ fide*; but that they would have proceeded upon Lord Tenterden's long since exploded doctrine. Suppose a man serves me with a notice that a certain bank-note for 500*l.* has been stolen, and afterwards I, *bonâ fide* and in course of business, change the note, giving the full value for it in money,—what is there to disentitle me to recover on the note?] Giving value and being ignorant of the loss alone will not constitute bona fides. Here is a man—an utter stranger,—who comes to ask for change of a 500*l.* note in June, 1854, bearing an old date, and the money-changer, without looking at his file of notices, or

making any inquiry beyond asking for the man's passport, and requiring him to write his name on the note, gives him the money. Are these notices to be totally disregarded by the money-changers of Paris, and facilities thus to be afforded for the disposal of stolen notes? [Cresswell, J. What is the obligation that is cast upon the money-changer from the receipt of a notice of this sort a year ago? Is his want of recollection of the notice evidence of mala fides?] No particular legal obligation is cast upon the party by the receipt of the notice: but it is an ingredient for the consideration of the jury. The plaintiff is bound to satisfy them that St. Paul took the note bonâ fide. [Crowder, J. Suppose, in going over the file, the notice had escaped St. Paul's attention,—would that have negatived his right to recover?] The question of bona fides was essentially a question for the jury; the onus of proving it lay on the plaintiff; and the circumstances under which the note was taken were very suspicious. [Jervis, C. J. Were those circumstances of suspicion to outweigh the fact of St. Paul's having given full value, and his want of knowledge of the loss at the time he took the note?] The moment the robbery is proved, the note is tainted: the presumption is, that the want of title extends to the person who presents it; and the burthen of proving bona fides rests upon the plaintiff. [Cresswell, J. The burthen of proof as to value, where it is shewn that the bill or note has been lost or stolen.] Where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen, the onus lies upon the holder to prove, not only that he gave value for it, but also that he took it bonâ fide: *Mills v. Barber*, 1 M. & W. 425. In *Bailey v. Bidwell*, 13 M. & W. 73, 2 D. & L. 245, Parke, B., says: "It certainly has been, since the later cases, the universal understanding, that, if the note were proved to have been obtained

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by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it; and that such proof casts upon the plaintiff the burthen of shewing that he was a *bonâ fide* indorsee for value. That has been considered in later times as settled." [*Cresswell*, J. My Brother Parke in that case seems to intimate that proof of giving value is to be taken as evidence of *bona fides*. He goes on,—“That being so, it was perfectly right in this case to cast upon the plaintiff the burden of proving that he gave value for the note.”] *Smith v. Braine*, 16 Q. B. 244, is an authority to the same effect. Lord Campbell there says: “Mr. Knowles, in his able argument, did not contend that under such a plea the defendant is always bound to give direct evidence of want of consideration, but freely admitted, that, where it is proved that the person who indorsed the bill to the plaintiff got possession of it fraudulently, the onus of proving consideration is cast upon the plaintiff. This doctrine must be considered as now fully established.” And the same view is presented by the cases collected in the notes to *Miller v. Race*, 1 Smith’s Leading Cases, 261 et seq., which shew that *bona fides* and value are both necessary. Lord Mansfield and Wilmot, J., lay down the same doctrine in *Grant v. Vaughan*, 3 Burr. 1523, 1527. So, in *Wookey v. Pole*, 4 B. & Ald. 1, 15, Bayley, J., says: “The holder *bonâ fide* and for a valuable consideration of a bank-note or bill of exchange, has a good title against all the world; because, in the case of bank-notes, they are considered as money, and pass as such, and it is essential for the purposes of trade that delivery should give a perfect title, and because, in the case of bills of exchange, this is the law and custom of merchants.” In *Snow v. Leatham*, 2 C. & P. 316, Abbott, C. J., in his summing up,

says,—“ If a person take a Bank of England note under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he cannot hold the proceeds of such note from the person who has lost it. On the approach of the Doncaster races of 1824, notice of the robbery was sent to the defendants, on a supposition that it was likely that the notes would be attempted to be passed there. Now, it is contended as matter of law, that notice once given is notice for all time. I do not go all that way; and I think it is for you to consider whether as men of business the defendants would fairly advert to a notice of this kind given a year before, or whether they might not suppose, as they heard nothing more about the matter, that the notes had been got back. It is proved for the defendants, that they do not ask who brings the notes, nor enter numbers or dates. But the question for you to consider, is, whether the defendants conducted their business in the race week in such a manner as to hold out temptation to persons unlawfully possessed of property to pass it to them, the defendants knowing that at such a time all sorts of persons, some being of the highest, and some of the most depraved classes, were then at that place. If you think that was so, you ought to find for the plaintiffs; but, if you think that there was nothing incorrect in the manner in which the defendants' bank was carried on, and that the defendants took the notes in the regular and proper course of business, you will find a verdict in their favour.” The jury found for the plaintiffs. In *Roscoe on Bills*, after referring, amongst others, to that case, and to *Snow v. Sadler*, 3 Bingh. 610, 11 J. B. Moore, 506, the learned author says,—“ From the above cases it will be seen, that, when the title of a party who has received a lost or stolen bill or note, comes in ques-

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tion between him and the true owner, there are three points to be decided,—1. Whether he took it *bonâ fide*, that is, whether he took it under such circumstances as may induce a jury to believe that he received it without any notice of the loss or the larceny. It seems that the question whether the bill or note was taken in the usual course of trade, is parcel of the question of *bona fides*; for, if it was taken out of the usual course of trade, it is evidence from which the jury may presume that the party taking it was aware of the badness of the title. 2. The second point is, whether the party taking the bill or note used due caution and diligence in making inquiries respecting the title; for, it is possible he may have acted quite *bonâ fide*, and yet have been guilty of great want of caution and diligence, as in several of the cases above cited. The degree of caution and diligence requisite, must always depend on the particular circumstances of the case; but it may be laid down as a general rule, that a person cannot safely take a bill or note from a stranger, without inquiring into the truth of the representations made by him, even though the party taking the bill or note be acquainted with the handwriting of the parties to it. The earlier cases do not seem to carry the rule to this extent, but it appears to be firmly established by the late decisions. 3. The third point (which has only arisen in the cases determined in the Common Pleas), is, whether the loser of the bill or note has used sufficient diligence in making known his loss." That, it is submitted, is the way in which cases of this sort should always be left to the jury. In *May v. Chapman*, 16 M. & W. 355, Parke, B., says: "I agree that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." The mode in which this case was presented to the jury shifts the burthen of proof, or rather the presumption, which is, that the

infirmity of title in a stolen note attaches on it in the hands of a holder even for value. Even upon the finding of the jury as it stands, the verdict ought to have been entered for the defendants. The jury found that St. Paul had the means of knowing that the note in question was stolen, at the time he took it, and ought to have known it. [*Jervis*, C. J. Does not that amount to want of notice?] Clearly not. The finding upon that point, at all events, is defective. Then, upon the question of bona fides, the affidavits shew that the jury were not unanimous. Upon the whole, therefore, it is submitted there ought to be a new trial.

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CRESSWELL, J. I am of opinion that there ought to be no rule in this case. Mr. Bovill has contended that there should be a rule, on the ground that the verdict has not properly dealt with the matters which were submitted to the jury. It seems to me, however, that the omission of St. Paul, who is substantially the plaintiff here, to avail himself of the means of knowledge of the alleged felony that were at his disposal, was not the point on which the decision of the case could properly be rested. A person who takes a negotiable instrument bonâ fide for value, has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof, may amount to negligence: and Lord Tenterden at one time thought negligence was an answer to the action. But the doctrine of *Gill v. Cubitt*, 3 B. & C. 466, 5 D. & R. 324, is not now approved of. I think, therefore, there is no reason to find fault with the verdict on that ground. Then, the jury have found, in substance, that the note in question was taken by St. Paul bonâ fide and for value. He could not have taken it bonâ fide, if at the time he took it he

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had notice or knowledge that the note was a stolen note. "Bonâ fide" means "really and truly, for value." I admit that the note might have been taken dishonestly, although full value were given for it. The Lord Chief Justice put that as one of the questions which the jury were to decide. They retired with three questions for their consideration; and they returned with the answers,—to the first, that the full value was paid by St. Paul,—to the second, that he had had notice of the felony,—and to the third, that he had no knowledge at the time he took the note, that it had been stolen, but that he had the means of knowledge if he had properly taken care of it. The Lord Chief Justice then put to them the question of bona fides, and the jury found that St. Paul had taken the note bonâ fide. Then, as to the affidavits of the jurymen,—without stopping to inquire whether affidavits of that sort are generally receivable, I apprehend it to be clear that a jurymen cannot be permitted to make an affidavit as to something which is passing in his own mind, contrary to what is passing in court as to the verdict, uncontradicted by him at the time. It does not appear that the jurymen who now make affidavits did not hear what was passing on the subject of bona fides, or that they objected to the answer of their foreman. But each of them says, that, if he had believed that the foreman of the jury, by answering any question of the Lord Chief Justice after their return into court, as to bonâ fide conduct of St. Paul & Co. with regard to cashing the said bank-note after notice, and which question of bona fides had not been determined upon by the jury, was expressing the opinion of the jury, and thereby giving in effect the verdict for the plaintiffs, he would have at once refused his concurrence in any such answer, because he was not, nor, as he believed, were a considerable majority of the jury, prepared to concur in an opinion that St. Paul & Co.'s

conduct in cashing the note after notice of the robbery was such as to entitle them to the property in the note. If that be so, I think the juryman would have been acting in defiance of his duty; for, to say, that, under the circumstances supposed, he would not have concurred in finding for the plaintiffs, is simply saying in so many words that he would not have done his duty. I think there is no ground whatever for a new trial.

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CROWDER, J. I am of the same opinion. The first ground upon which we are asked to grant a rule for a new trial, is, that the question of bona fides was not properly submitted to the jury by the Lord Chief Justice. It seems to me, however, that that question *was* properly brought before them. The jury retired to consider in what way they should answer three questions which had been presented for their consideration, and when they returned into court, and by the foreman gave their answers, a further question was put to them, viz. whether they thought that St. Paul took the note *bonâ fide*; to which the foreman answered, that he did. I can see no objection to the way in which the case was left. No doubt, the Lord Chief Justice in the course of his summing up used some strong observations. But it seems to me that the circumstance of the full value having been given for the note, was almost conclusive to shew that the note was taken *bonâ fide*. That question was put to the jury in terms; and they so decided. Then it is said that the jury having found that St. Paul at the time he took the note had the means of knowledge of the robbery if he had taken proper care, there ought to have been a verdict for the defendants. I do not, however, see that that ought to have the slightest effect. It might have been a circumstance very fit to be taken into consideration in coming to a conclusion as to bona fides: but, coupled with the finding of the jury that

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St. Paul had no knowledge of the robbery at the time he paid the money, I do not think it any ground for invalidating the verdict. As to the affidavits, I do not think it necessary to determine one way or the other whether such affidavits ought to be admitted. But I agree with my Brother Cresswell that the affidavits, if looked at, merely shew that some of the jury strongly inclined not to find for the plaintiffs, even though they were satisfied that St. Paul's conduct had been *bonâ fide*. They say they should not have concurred in the verdict if they had understood that their finding *bona fides* would have led to a verdict for the plaintiffs. Taking all the circumstances together, I do not see how they could possibly resist finding a verdict for the plaintiffs.

WILLES, J. I am of the same opinion. The phrase "*bonâ fide*" of itself would be likely to mislead the jury. They should be told what *bona fides* means, viz. taking the note for value, and without knowledge of the robbery. Not to tell them that, would be just ground of complaint. It is in truth a compendious way of expressing what the jury have found. That appears distinctly from the case of *May v. Chapman*, 16 M. & W. 355, where it is laid down by Parke, B., that "notice and knowledge" means not merely express notice, but knowledge, or the means of knowledge to which the party wilfully shuts his eyes,—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded. The jury here, in finding that St. Paul had no notice of the robbery at the time he took the note, do in truth find all that is necessary to constitute *bona fides*. Mr. Bovill, however, relies upon the affidavits of the jurymen, as shewing that the jury,—or at least some of them,—meant something very different from the legal import of the words. If the affidavits are to be taken as a statement of something

which passed in the jury-room, they clearly are not admissible; and, if they are taken as referring to something which passed in court, shewing that, in the opinion of certain of the jury, the absence of notice meant something different from the ordinary legal meaning of the words, it does not lie in the mouth of a jurymen who hears what passes and says nothing, to come afterwards and say that he understood and meant something altogether different. But, even if those gentlemen had at the time the verdict was being delivered audibly expressed what they now say, it would have made no difference; for, all they say amounts only to this,—that, notwithstanding St. Paul paid the full value for the note, and was ignorant at the time that it had been stolen, he was not entitled to be considered as a bonâ fide holder; that is, that his negligent mode of conducting his business disables him from being the bonâ fide holder in the particular case. That is in truth an attempt to revive the exploded doctrine of *Gill v. Cubitt*. Speaking of that case, Lord Brougham, in *The Bank of Bengal v. Fagan*, 7 Moore's P. C. Cases, 72, says: "It may be taken as established, that, whatever may have been the law laid down in *Gill v. Cubitt*, 3 B. & C. 466, 5 D. & R. 324, 1 C. & P. 463, 487, and *Down v. Halling*, 4 B. & C. 330, 6 D. & R. 455, 2 C. & P. 11, and one or two other cases, and not abandoned, at least as far as the language went which the court used in some subsequent cases, is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." And at the close of his judgment, he again says: "I cited the cases of *Gill v. Cubitt* and *Down v. Halling*, as having gone far to overrule *Lawson v. Weston*, 4 Esp. N. P. C. 56. These cases are no longer law, and Lord Kenyon's opinion is set up, and supported by all the lawyers." I think the affidavits were inadmissible; and that, assuming them to be admissible, they shew

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merely that the deponents dissent from the law as now fully settled on this subject. For these reasons, I am of opinion there should be no rule.

JERVIS, C. J., concurred.

Rule refused. (a)

(a) See *Backhouse v. Harrison*, 5 B. & Ad. 1098; *Goodman v. Harvey*, 4 Ad. & E. 870; *Uther v. Rich*, 10 Ad. & E. 734; *Arboin v. Anderson*, 1 Q. B. 498.

Nov. 22.

To warrant the court in making an order, under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property, on the ground of his being beyond seas,—it must be shewn that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country.

An order will not be granted where it appears that the husband is in correspondence with his wife, and remitting sums of money for her support, however small.

In the Matter of EMMA, the Wife of WILLIAM SQUIRES.

PHIPSON moved for an order to enable Mrs. Squires to convey certain property to which she was separately entitled, without the concurrence of her husband, under the 3 & 4 W. 4, c. 74, s. 91. It appeared from the affidavit that the parties were married in 1849, and that the husband went to Australia in June, 1852, and the applicant had no means of knowing whether or not he would ever return to this country. But it also appeared that she had received letters from him from time to time, the last dated the 12th of August, 1855 (from which it appeared certain that he had no intention of returning for some considerable time), and also some small remittances, not exceeding 7*l.* per annum.

JERVIS, C. J. I do not think these parties can be said to be "living apart" within the meaning of the statute. The husband has not gone away under circumstances calculated to induce us to think that he has no intention to come back. He keeps up a correspondence with his wife, and sends her money, more or less, for her support.

The rest of the court concurring,

Rule refused. (b)

(b) See *In re Ann Kelsey*, antè, Vol. XVI, p. 197.

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KNIGHT v. POCOCK.

Nov. 6.

WORDSWORTH moved to set aside the copy and service of a writ of summons, and subsequent proceedings. The writ was issued pursuant to the Summary Proceedings on Bills of Exchange Act, 1855,—18 & 19 Vict. c. 67. The ground of the motion was, that the indorsement on the writ was defective, inasmuch as in setting out the promissory note upon which the action was brought, the name of the maker was omitted. He submitted, that, the object of the statute being, to dispense with a declaration in all cases where leave to appear is not obtained, it became important that the indorsement should shew that the plaintiff had a right to sue upon the bill or note,—more especially as the statute deprives the defendant of the means of getting redress for an imperfect indorsement, by writ of error.

The omission of the name of the maker of the note in the indorsement of a writ under the Bills of Exchange Act, 1855, is an irregularity; but the court will, upon a motion to set aside the copy and service, allow the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852, on payment of costs.

Hawkins shewed cause in the first instance. Assuming this to be an irregular indorsement, the court may amend it; for, by s. 7, it is enacted that “the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be applicable, extend and apply to all proceedings to be had or taken under this act.” [Crowder, J. An amendment under the 15 & 16 Vict. c. 76, s. 222 (a), requires a special or substantive motion.] This case is provided for by the 20th section of the 15 & 16 Vict. c. 76, which enacts, that, “if the plaintiff or his attorney shall omit to insert in or indorse on any

(a) And see 17 & 18 Vict. c. 125, s. 96.

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writ or copy thereof any of the matters required by this act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which the same shall issue, or to a judge; and *such amendment may be made upon any application to set aside the writ*, upon such terms as to the court or judge may seem fit."

Wordsworth, in support of his rule. The 20th section of the 15 & 16 Vict. c. 76, was intended to apply to amendments of writs for the purpose of bringing the party into court. But here the plaintiff gets an immediate judgment according to the indorsement on the writ: see Sched. B. The judgment must be in accordance with the indorsement of the writ of summons. [*Jervis*, C. J. A specially indorsed writ under s. 25 of the 15 & 16 Vict. c. 76, is something more than mere process to bring the defendant into court.] The omission is matter of substance, and ought not to be amended. At all events, the *copy* cannot be amended.

JERVIS, C. J. The 20th section of the 15 & 16 Vict. c. 76, expressly says that defective indorsements shall not render the writ void, but shall be considered as irregularity only, and that the court may order the amendment, as well of the copy as of the writ, upon an application to set the same aside. It seems to me, that, of all others, this is peculiarly a case for amendment. The defendant could not possibly be misled by the omission. I think the writ and copy should be amended, and the service stand good.

CROWDER, J. The statute requires the indorsement to contain an exact copy of the bill or note. This is not an exact copy: there is a material omission, viz. the

name of the maker of the note. But I agree that it is amendable.

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The rest of the court concurred.

Wordsworth asked for the costs of the motion

Per Curiam,

Rule to amend, on payment of costs.

KEANE v. SMALLBONE.

Nov. 6.

HAWKINS moved to set aside a warrant of attorney, on the ground that it had been altered after execution. A blank had been left for the date in the warrant of attorney and also in the defeasance, which had been since filled up,—whether with the real date or not did not appear. In Comyns's Digest, *Fait* (F. 1), it is said, that, "if a deed after execution be altered in a material place, by erasure, interlineation, addition, &c., by the obligee himself, it shall be void, and the obligor may plead non est factum. So, if it be altered by the obligee himself, though it be in a place not material; as, by the addition of a date:" for which Comyns cites *Pigot's Case*, 11 Co. Rep. 26. b., S. C. *Winchcombe v. Pigott*, 1 Roll. R. 32, F. Moor, 835, 3 Bulstr. 246, and *Cospey v. Turner*, Cro. Eliz. 800.

Filling in the date of a warrant of attorney after execution, is not such an alteration as will avoid the instrument.

JERVIS, C. J. Putting in the real date, which we must assume this to be, is no alteration.

WILLES, J. The parties clearly must have intended the date to be put in. The alteration was quite immaterial.

The rest of the court concurring,

Rule refused.

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To entitle a creditor who has obtained judgment against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder, under the 8 & 9 Vict. c. 16, s. 36, it must be shewn that the party against whom the application is made comes within the statutory definition of a shareholder, viz. one who has signed the deed of settlement: it is not enough to shew that he has acted as a director of the company.

MOSS v. THE STEAM GONDOLA COMPANY.

ADDISON moved for leave to issue execution against John Reed, under the 8 & 9 Vict. c. 16, s. 36, as a shareholder in a joint-stock company completely registered under the 7 & 8 Vict. c. 110.

The affidavits upon which the motion was founded stated, that a writ of summons was issued against the company at the suit of the plaintiff on the 30th of September, 1854, and served on E. J. Eliot, the secretary of the company, on the 28th of October; that, no appearance having been entered, judgment was signed against the defendants on the 8th of November; that every endeavour had been made to ascertain whether there were any property or effects of the company against which satisfaction of the said judgment could be obtained, but without success, and that the deponent, on inquiry at the late offices of the company, was informed that the company had long ceased to carry on business, and that their property and effects had been seized for rent; that a fi. fa. had issued against the company, and been returned nulla bonâ; that, on the 22nd of December, 1854, John Reed,—whom the deponent was informed and believed to be one of the directors and shareholders of the company,—was served with notice of the plaintiff's intention to apply for leave to issue execution against him; that the judgment remained unsatisfied; and that the company was not incorporated by act of parliament or charter, nor a company the liability of the members of which is restricted by virtue of any letters-patent. There was also an affidavit of the secretary, which stated, that he had on various

occasions attended as secretary at the meetings of the directors of the company, and that, on divers of such occasions, John Reed attended as one of the directors, and took part in the business then and there transacted, and that, by the constitution of the company, he could not have been a director unless he had also been a shareholder, although he was not registered as such; and that the company had ceased to carry on its business, and had no property or effects, and that the property and effects which the company once had were seized by the landlord for rent in or about the month of January, 1854. [*Jervis*, C. J. Can you have execution against one as a shareholder, whom you do not shew to be registered, or to have executed the deed?] This person is shewn to have acted as a shareholder only could act. [*Jervis*, C. J. Does he come within the definition of a shareholder in s. 3,—a “person entitled to a share in the company, and who has executed the deed of settlement, or a deed referring to it?”] In *Maguire’s Case*, 3 De Gex & Sm. 31, the owner of several shares in a steam-packet company transferred two of them to his son, by a document which was not executed by the son, nor entered in the company’s books, nor otherwise perfected according to the provisions of the deed of constitution. The son was not aware of the transfer. By a rule of the company, every proprietor was always entitled to a free passage by the company’s vessels; and the son on several occasions obtained certificates from the company’s office that he was a proprietor, which entitled him to a free passage; and he also signed each certificate, and the company’s books in respect of these certificates, as proprietor, and obtained a free passage accordingly, but he never received dividends, nor did any other act as a proprietor: yet it was held by Vice-Chancellor Knight Bruce that the son was a contributory in respect of such two shares. “It is contended,” says

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the learned judge, and correctly, that various formalities required by the deed were not pursued, and therefore it is argued that this gentleman ought not to be considered as a proprietor. It is, however, impossible for him to be permitted to say that the formalities have not been waived, after all that he has done." [*Jervis*, C. J. That might be very applicable, if you were suing Mr. Reed.] In order to proceed against him as a shareholder, it is not necessary to shew that he has signed the deed : it is enough to shew that he has done acts to preclude him from saying that he is not a shareholder. [*Willes*, J. Why not proceed by scire facias, under s. 66? *Crowder*, J. In *The Galvanized Iron Company v. Westoby*, 8 Exch. 17, the defendant was held not to be liable as a shareholder, because he had not executed the deed of settlement.] This party is by his own acts and conduct estopped from denying that he is a shareholder.

JERVIS, C. J. You are asking for a statutory remedy against a shareholder. To entitle you to that, you must bring the party sought to be charged within the statutory definition. That you have not done, and consequently you are not entitled to a rule. You may proceed in the mode suggested by my Brother Willes.

The rest of the court concurring,

Rule refused.

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EBENEZER DAVIES v. DANIEL PRATT.

Nov. 21.

THIS was an action for a libel consisting of three distinct parts. The defendant pleaded, not guilty, and a justification *as to one part* of the libel only. The cause (then at issue) and all matters in difference between the parties were, by a judge's order of the 16th of October, 1854, referred to a barrister, who was to make his award of and concerning the matters referred, on or before a given day,—“but so as the reference hereby made be not proceeded with until the arbitrator hereby appointed shall have made and published his award in a certain action of *Tidman v. Ainslie*, now pending in the court of Exchequer, and which action has been referred to the award of the said arbitrator.”

The arbitrator made an award substantially in favour of the defendant,—finding the first issue of not guilty generally for the plaintiff, but without damages, and the justification for the defendant, and awarded all the costs of the action and of the reference and award to the defendant; but the award did not upon the face of it shew that an award had been made in the action of *Tidman v. Ainslie*: and, in making his award in this action,

1. An arbitrator, in making an award in favour of the defendant, by mistake called him “David,” instead of “Daniel.” The award having been sent back to him for amendment, he wrote at the bottom of it the following certificate:—
“In pursuance of a rule, &c. I do hereby certify that this my award ought to be amended by substituting the name Daniel P. for the name of David P., the name David P. having been inserted therein by mistake instead of Daniel P.:”—
Held, a sufficient amendment.

2. It is not competent to a party, in answer to a motion under the 1 & 2 Vict. c. 110, s. 18, to raise by affidavit any objection which does not appear upon the face of the award,—as, for instance, that the arbitrator (the action referred being for a libel, with a plea of not guilty, and a justification *as to part*,) has found for the plaintiff on the first issue (the finding on the second being for the defendant), but *without damages*.

3. By an order of reference, a cause and all matters in difference were referred to a barrister, “but so as the reference hereby made be not proceeded with until the arbitrator hereby appointed shall have made and published his award in a certain action of *T. v. A.*, now pending in the court of Exchequer, and which action has been referred to the award of the said arbitrator:”—Held,—upon a motion under the 1 & 2 Vict. c. 110, s. 18,—that it was no answer to the rule, that the award omitted to state on the face of it, that, previously to proceeding with the reference, the arbitrator had made an award in *T. v. A.*; for, that the court would presume that he did his duty.

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The costs having been taxed, and the plaintiff duly served with a copy of the award and of the master's allocatur, and the money having been demanded, but not paid, a rule was obtained in Trinity Term last, calling upon the plaintiff to shew cause why he should not pay the taxed costs so awarded against him, pursuant to the 1 & 2 Vict. c. 110, s. 18, or why, if necessary, it should not be referred back to the arbitrator to amend his award, by inserting therein the defendant's true name.

This rule was made absolute in the latter alternative, without costs (*vide antè*, Vol. XVI, p. 586), and the award again went before the arbitrator, who, having before him the case of *Howett v. Clements*, *antè*, Vol. I, p. 128, appended to the award the following certificate:—

"In pursuance of a rule of the court of Common Pleas, of the 11th of June last, I do hereby certify that this my award ought to be amended by substituting the name Daniel Pratt for the name of David Pratt, the name David Pratt having been inserted therein by mistake instead of Daniel Pratt."

Willes, in the last term, again obtained a rule calling upon the plaintiff to shew cause why he should not pay the costs, pursuant to the 1 & 2 Vict. c. 110, s. 18.

Bernard now shewed cause. The award was directed to go before the arbitrator for amendment. It has been before him, but he has not amended it: he has contented himself with certifying, that, in pursuance of the rule of this court, it *ought to be amended*, which is saying no more than the court and the parties had already said. The case of *Howett v. Clements* is no authority for what the arbitrator here has done. There, the arbitrator had by mistake called the plaintiff *James Charles Howett*

instead of *Joseph* Charles Howett, and, upon a reference back to him for amendment, the arbitrator made the following indorsement on the award, which by a note in the margin he awarded and directed should stand as part of his award:—"In pursuance of an order of the court of Common Pleas, of the 23rd of November last, I, the within-named arbitrator, have re-considered this my award; and I hereby certify and declare that the same ought to be amended by substituting the name *Joseph* Charles Howett for the name *James* Charles Howett, wherever such name occurs in the said award, and that the said award ought now to be read as if the name *Joseph* Charles Howett had originally stood therein instead of the name of *James* Charles Howett, in every instance where such name occurs in the said award, the name *James* Charles Howett having been therein inserted by mistake instead of the name *Joseph* Charles Howett, and *Joseph* Charles Howett being the person thereby meant and intended by me." [*Jervis*, C. J. Is not that an express decision?] No objection was there taken: the only point made, was, that the arbitrator had improperly altered his award in other respects, without giving notice to the defendant. In all the other cases, the amendment was actually made by the arbitrator. Here, he has not even said, as in *Howett v. Clements*, that the award is to be "considered as amended." [*Jervis*, C. J. The case of *Howett v. Clements*, though not a very ponderous authority, is still weighty enough to outpoise this trifling objection. If it were necessary, we might send into the next court and ask the arbitrator to make his amendment now.]

Then, the award is bad, inasmuch as the arbitrator, has found no damages on the first issue, which he was bound to do, the justification not covering the whole libel. [*Crowder*, J. How can you take this objection now? The pleadings are not before the court.] They

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are brought before the court upon affidavit. [*Crowder*, J. Upon such a motion as this, you can only avail yourself of objections that are apparent on the face of the award: *MacArthur v. Campbell*, 2 Ad. & E. 52, 4 N. & M. 208, where Williams, J., says that "a contrary decision would invert the regular order of proceedings, and would make every motion for an attachment an opportunity for discussing questions which ought properly to be raised by motion for setting aside an award." *Cook Evans* (who appeared to support the rule) observed, that this point was not made before the arbitrator, or it might have been met by an amendment; and that this was in effect an application for judgment non obstante veredicto, which cannot be.] *Rowe v. Sawyer*, 7 Dowl. P. C. 691, is an authority, that, on shewing cause against a rule for an attachment for non-performance of an award, reference may be made to the pleadings in the cause, where there is an affidavit identifying them with the award: for, Coleridge, J., says,— "I think you cannot, *without an affidavit*, identify the pleadings with the award, when you are referring to objections alleged to exist on the face of the award."

The award is further bad, for not shewing upon the face of it that the arbitrator had, before proceeding with this reference, made an award in the case of *Tidman v. Ainslie*, the making of which was a condition precedent to his right to make this award. In *Russell on Awards*, 1st edit. p. 171, it is said: "Before taking any step in the reference, it is advisable for the arbitrator to look carefully to the terms of the submission, to see if it contain any provision which makes the doing of any act a condition precedent to his entering upon the arbitration. As, for instance, if the agreement of reference direct that the arbitrator is to take a view of the premises, the subject of the dispute, a certain time before proceeding with the reference, he should take such view

within the prescribed period, or it might afterwards be urged against the validity of the award, that he had not acted in pursuance of the powers intrusted to him,"—citing *Spence v. The Eastern Counties Railway Company*, 7 Dowl. P. C. 697.

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Cook Evans, contra, was not called upon.

JERVIS, C. J. I am of opinion that no answer has been given to this rule. The first objection is expressly cured by the case of *Howett v. Clements*. The arbitrator having in his award by mistake called the defendant David instead of Daniel, the award was referred back to him for amendment; and, in obedience to our rule, the learned arbitrator writes at the foot of his award,—“I do hereby certify that this my award ought to be amended by substituting the name Daniel Pratt for the name of David Pratt, the name David Pratt having been inserted therein by mistake instead of Daniel Pratt.” I think, on the authority of *Howett v. Clements*, which the arbitrator seems to have closely followed, that is a sufficient amendment. The second objection, which arises on the form of the pleadings, is answered by this,—that it is not competent to a party, in answer to a motion for an attachment for non-performance of an award, or for a rule under the 1 & 2 Vict. c. 110, s. 18, to urge an objection which does not appear upon the face of the award. The reason is this, that, if that course were allowed, the other side would not be prepared to meet the objection. The proper course is, to move to set aside the award. Then, the third and last objection is, that, whereas the order of reference provides that the arbitrator shall not proceed with this reference until he has made and published his award in another action then pending, and which had also been referred to him,—it does not appear upon the face of the

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award in this case that an award had previously been made in the other action ; and consequently, it is said, the authority of the arbitrator in this case is not shewn to exist. The short answer, as it appears to me, to that objection, is, that we will not presume that the arbitrator has done other than his duty ; and that it is not a condition precedent to his authority to make an award in this case, that the fact of his having made an award in the former case should be stated in so many words in his award.

WILLIAMS, J. So early as the case of *Holland v. Brooks*, 6 T. R. 161, the court lay it down that "a party cannot object to an award for any defect not apparent on the award itself, in shewing cause against a motion for an attachment, but that he must obtain a rule for that purpose within the time limited by the act of parliament,"—9 & 10 W. 3, c. 15. Upon the other points also, I entirely concur in the opinion expressed by the Lord Chief Justice.

CROWDER, J., concurred.

WILLES, J., took no part in the discussion.

Rule absolute.

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In the Matter of ANN SUSANNAH, the Wife of
RICHARD YARNALL.

Nov. 26.

THOMAS, Serjt., moved for an order that Ann Susannah Yarnall, described in the affidavit upon which the motion was founded, as the wife of Richard Yarnall, be at liberty by deed or surrender to dispose of certain property to which she was entitled under the will of her grandmother, Elizabeth Mutlow, to such person or persons as she might think fit, without the concurrence of *her former husband*, "Joseph Wells, late of the parish of Portsea, in the county of Southampton, mariner."

The court granted an order to dispense with the concurrence of the husband in a conveyance by the wife of her separate property, under the 3 & 4 W. 4, c. 74, s. 91,—upon an affidavit shewing that he had absconded, and had not been heard of since the year 1837, although it also appeared that she had in the meantime married again.

The affidavit stated that the deponent "Ann Susannah Yarnall," on the 31st of August, 1828, intermarried with Joseph Wells; that they lived together for about twelve months; that, in 1829, the said Joseph Wells left his said wife, and went away from Portsea; that she had never seen him since that time, and had not heard of or from him since the year 1837; that she had lived separate and apart from the said Joseph Wells since the year 1829; that she had since intermarried with one Richard Yarnall; and that the residence of the said Joseph Wells was not known to the deponent.

JERVIS, C. J. I think the order may go. Of course it will not affect the purchaser's right to require the concurrence of the present husband.

Fiat. (a)

(a) See *Ex parte Noy*, 7 Scott, N. B. 434.

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Personal expenses of the candidate,—such as, hotel bills, railway fares, and the like,—are not within the 16th section of the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102.

The "agent for election expenses," duly appointed under the 81st section, is not necessarily, without a further appointment, the agent to whom the bills are directed by s. 16 to be sent.

GRANT v. GUINNESS.

THIS was an action for money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request, and for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded,—first, never indebted,—secondly, that, after the passing of a certain act of parliament called "The Corrupt Practices Prevention Act, 1854," the defendant was a candidate at an election within the meaning of that act, that is to say, a candidate at an election for members to serve in parliament for the borough of Barnstaple; and that the work and materials and money in the declaration mentioned were done, provided, and expended by the plaintiff as agent for the defendant for or in respect of the said election; that the account mentioned to have been stated in the declaration, was stated in respect to the said work, materials, and money, and not otherwise; and that the plaintiff's claim is wholly and entirely for or in respect of the said election; and that the plaintiff did not send in any bill, charges, or claim in respect of the same, within one month from the day of the declaration of the said election, to the defendant, as such candidate, or to any authorised agent of the defendant as such candidate, acting on his behalf.

Upon these pleas the plaintiff joined issue.

The cause was tried before Williams, J., at the sittings at Westminster in last Easter Term.

The facts that appeared in evidence were as follows :—
The plaintiff is a parliamentary and election agent: the

defendant is one of the sitting members for the borough of Barnstaple. The action was brought to recover 140*l.* 15*s.* 3*d.*, the balance of the plaintiff's claim as the defendant's agent at the election in August, 1854.

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The particulars of demand were as follows:—

1854.	£	s.	d.
August 8th. Retainer	26	5	0
12 to 26. Fifteen days engaged on business of election	78	15	0
Cab and railway to Barnstaple	2	18	9
Half subscriptions to charities	4	1	6
Do. to Appledore boatmen	0	13	6
Hotel bill	8	16	6
Cab, railway, and luncheon, home	3	4	0
Fee to counsel and clerk on case as to annuity	2	4	6
Half expenses of journey to Exeter, to pay bills	3	16	6
Paid on account of Barnstaple bills	20	0	0
	£150	15	3
August 25th. Cash of Mr. Guinness	10	0	0
	£140	15	3

By the 31st section of the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, agents for election expenses are to be appointed; and, prior to the defendant and Mr. Laurie (the other candidate) leaving London, they respectively appointed agents for that purpose,—one Maynard being appointed by the defendant, and one Peard for Laurie, each of them making the declaration required by the statute.

The plaintiff having, on the 4th of September, 1854, made out a statement of the bills and expenses of the candidates, amounting in the whole to 690*l.* 12*s.*, sent

1855. the same, together with the bills themselves, to M
 GRANT Maynard, with the following letter :—
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“ 47. a. Moorgate Street,
 “ 4th September, 1854.

“ I send you, as agent for expenses under the act, the accounts to be paid by the members. You will observe that the total is 690*l.* 12*s.*; but from this amount is to be deducted 91*l.* 12*s.* 5*d.* paid by you at Barnstaple, leaving 598*l.* 19*s.* 7*d.* to be provided for. Please send the bills to Mr. Jerwood [the election auditor], and I will communicate with the members, and arrange as to the payment.

(Signed) “ R. R. Grant.

“ H. Maynard, Esq.”

The accounts were accordingly sent to Mr. Jerwood; but, most of them being made out to “ Messrs. Laurie and Guinness,” he objected to receive them in that shape, and required separate accounts for each candidate, and returned them to Mr. Maynard on the 6th of September. Fresh accounts were afterwards prepared and sent.

On the part of the defendant, it was objected that there was no nomination in writing of the plaintiff as the defendant’s agent for election expenses, pursuant to the statute 17 & 18 Vict. c. 102, s. 31, and therefore that he was not entitled to recover; that Maynard was not an agent for the delivery of the bill, within the 16th section of the act; and that, if he was, the plaintiff had not sent in his account to him, as required by the act.

The jury returned a verdict for the plaintiff for 69*l.* 3*s.* 9*d.* on the first issue, and, as to the second, in reply to a question of the judge, they stated that the plaintiff *had* duly sent in his account to the defendant’s agent for election purposes, Maynard.

Wood, in Easter Term last, obtained a rule nisi for a

nonsuit, on the ground that the plaintiff was not entitled to recover in this action without an appointment in writing under the Corrupt Practices Prevention Act, 1854; or to enter a verdict for the defendant on the second plea, on the ground that there was no evidence that the account mentioned in such plea was delivered to the defendant or to any authorised agent of the defendant; or for a new trial, on the ground that there was no evidence to support the verdict.

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E. James and Couch, on a former day in this term, shewed cause. The question in this case turns mainly upon the 31st section of the 17 & 18 Vict. c. 102, which enacts that "every candidate shall, before or at the nomination, or as soon after as conveniently may be, declare to the election auditor in writing the name or names of his agent or agents for election expenses, who shall be appointed in writing, and that he has not appointed and will not appoint any other agent without in like manner declaring the same to the election auditor; and no other than such agents shall have authority to expend any money or incur any expenses of or relating to the election in the name or on the behalf of the candidate: and such agents may pay any of the current expenses of the election necessary to be paid in ready money, provided that such agents shall make out, to the best of their ability, and render, from time to time, true and particular accounts to the election auditor of all such payments; and every such agent shall, as soon as conveniently may be after his appointment as aforesaid, make and sign the following declaration:—‘I [A. B.], being appointed an agent for election expenses by [X. Y.], a candidate at this election, do hereby solemnly and sincerely declare that I have not knowingly made, authorised, or sanctioned, and that I will not knowingly make, authorise, or sanction, any payment on account of

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this election, otherwise than through the election auditor, save as excepted and allowed by The Corrupt Practices Prevention Act, 1854.' ” The object of the act was, to provide that the person who expends money or incurs debts for the candidate for the purposes of the election, should be appointed in a public and formal manner. Here, the statute was complied with, by the appointment of Mr. Maynard. Grant was not an agent for election expenses within the act ; and there is nothing in the act to prevent a candidate from having a private agent as well. [*Jervis*, C. J. Grant seems to have done no more than an ordinary agent or servant might have done.] The 22nd section expressly provides that the personal expenses of any candidate shall be defrayed by the candidate himself, or by his authority ; and of these no account need be sent in to anybody. The “ auditor of election expenses ” is, by s. 15, to be appointed by the returning officer of the county, city, or borough : by s. 16, all bills, charges, or claims upon any candidate for or in respect of any election, are to be sent, within one month from the day of the declaration of the election, to the candidate, or to some authorised agent of such candidate ; which bills, charges, or claims are within a given time to be sent in to the election auditor (s. 17), through whom alone (s. 18) they are to be paid. All these provisions, however, are applicable solely to those expenses which properly fall within the description of “ expenses of the election.” It may be doubtful whether this defence,—illegality by statute,—is open to the defendant upon never indebted : but, assuming that it is, several of the items in the plaintiff’s particulars clearly are not expenses relating to the election : for instance, “ Cab and railway to Barnstaple, 2*l*. 18*s*. 9*d*,” “ Appledore boatmen, 18*s*. 6*d*.” (for rowing across the river), “ Hotel bill, 8*l*. 16*s*. 6*d*,” and “ Cab, railway, and luncheon, home, 3*l*. 4*s*,” are clearly mere personal expenses. The same may be said

of "Half subscriptions to charities, 4*l.* 1*s.* 6*d.*," and "Fee to counsel and clerk on case as to annuity, 2*l.* 4*s.* 6*d.*,"— which was a case stated for the opinion of counsel as to the validity of the defendant's qualification, in respect of an annuity, and which question had no more reference to the Barnstaple election than to any other. Then comes an item for "Half expenses of journey to Exeter, to pay bills, 3*l.* 16*s.* 6*d.*" [*Jervis*, C. J. That must, I think, be considered as part of "election expenses."] The plaintiff is at all events entitled to a verdict as to the other items. There is no pretence for saying that this was a verdict against evidence. It is certainly difficult to see how the jury came to the conclusion that the plaintiff was entitled to 69*l.* 3*s.* 9*d.*: but it was purely a question for them.

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Wood, in support of his rule. The 16th section of the statute enacts that "all persons, as well agents as others, who shall have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims within one month from the day of the declaration of the election, to such candidate, or to some authorised agent of such candidate acting on his behalf, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof." Section 18 enacts that "no payment of any bill, charge, or claim, or of any money whatever, for or in respect of any election, or the expenses thereof (except as herein excepted), shall be made by or by the authority of any candidate, except by or through such election auditor, and any payment made by or by the authority of any candidate, otherwise than as herein provided, shall be deemed and taken to be an illegal payment," &c. The 25th section enacts that "any candidate, and his agents by him appointed in writing, according to the provisions of this act, may, at

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any time before the day of nomination, pay any lawful and reasonable expenses in respect of the election which he or they shall bonâ fide believe fit and proper to be paid, in ready money, and the payment of which cannot conveniently be postponed ; provided that the candidate and his agents shall, upon or before the day of nomination, make out to the best of his ability, and deliver to the election auditor; a full, true, and particular account of all such payments, with the names of the persons to whom they have been made, signed by such candidate or his agents respectively, and no payment so made shall be a legal payment within this act, unless such account thereof shall be duly rendered to the election auditor." Then, the 31st section requires the appointment of the election agent to be in writing. The plaintiff clearly is an agent within the 16th section. The agent must be some person authorised by the candidate, that is, an agent other than the person appointed as agent for election expenses, or with a different appointment. There is no limit to the number of agents. So far as the items in the particulars of demand come within the description of "election expenses," it was not necessary that the illegality should be pleaded specially. The legislature have declared that they shall not be recoverable, except in the way pointed out. The whole spirit of the act was, that it should be known who the agent is. [*Jervis, C. J.* The third, fifth, sixth, and seventh items are clearly personal expenses, and the fourth and eighth are far too doubtful to hold to be within the act. The only question therefore will be,—Mr. James having given up the ninth item,—whether as to the rest a bill has been duly delivered.] There was no evidence of any other contract than that spoken to by the plaintiff, viz. of a retainer at twenty-five guineas, and five guineas per day additional. This the jury have negatived by their find-

ing. The principle on which a jury should measure the damages in a case of this sort is well enunciated in Sedgwick on Damages, 1st edit. p. 214 (2nd edit. 201), as follows:—"It is in truth but slowly and at comparatively a recent period, that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages. But, by degrees, the salutary principle has been recognized; and it is now well settled, that, in all actions of contract, subject to the exception already noticed (in cases of breach of promise of marriage), and in all cases of tort where no evil motive is charged, that the amount of compensation is to be regulated by the direction of the court, and that the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down. It is, in fact, indispensable that it should be so: the measure of damages is the gist of the remedy; the remedy is no part of the facts of the cause, while, on the other hand, it so completely controls the rights of the parties, that, if any absolute discretion be given to the jury over the amount of compensation, the power of the court over questions of law would be most emphatically a barren sceptre. The measure of damages in all cases, then, where no complaint is made of evil motive, is a pure question of law; in all cases of contract, the sole object of the court, is, to ascertain the agreement of the parties, and that agreement, as a general rule, controls the measure of remuneration. 'In contracts,' said the Supreme Court of Massachusetts,—in *Leland v. Stone*, 10 Mass. Rep. 459,—'where the precise sum is fixed and agreed on by the parties, as in many actions of assumpsit and covenant, the jury are confined to that sum.' It has been repeatedly said that courts will not attempt to modify the contracts of the parties. Their only duty is, to expound and to enforce them." If that be the cor-

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rect mode of estimating the damages in a case of this kind, the jury here have evidently proceeded upon an erroneous principle,—upon some rough notion of equity, choosing, perhaps, to disbelieve the evidence on both sides.

WILLIAMS, J., expressed himself not dissatisfied with the verdict.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—This was an action by Grant against Guinness to recover a sum claimed by the former for work done and payments made for the latter in relation to an election for the borough of Barnstaple. The defence, in substance, is, that the plaintiff did not send in any bill, charges, or claim in respect of his demand, within one month from the day of the declaration of the election, to the defendant as candidate, or to any authorised agent of the defendant as such candidate, acting on his behalf, pursuant to the statute 17 & 18 Vict. c. 102. The jury having found a verdict for the plaintiff for 69*l.* 3*s.* 9*d.*, a motion has been made for a new trial, on the grounds that there was no proof of the appointment of Grant as agent, in writing, as required (it is said) by the statute, and that the verdict was against evidence.

In the course of the argument, we intimated an opinion that the verdict could not be disturbed. The evidence, it is true, was directly contradictory: but it was a case entirely and peculiarly for the jury. They have thought fit to find a verdict for the plaintiff; and we see no ground for interfering with the conclusion to which they have arrived.

As to the other point, we find the case divisible into several parts; and it was arranged at the trial that the verdict, if undisturbed by the court, should stand for so much as we should think unaffected by the statute.

It was contended, on the argument of the rule, that **four** of the items in the particulars of the plaintiff's claim,—viz. "Cab and railway to Barnstaple, 2*l.* 18*s.* 9*d.*," "Payment to Appledore boatmen, 13*s.* 6*d.*," "Hotel bill, 8*l.* 16*s.* 6*d.*," and "Cab and railway home, 3*l.* 4*s.*," together amounting to 15*l.* 12*s.* 9*d.*,—were mere personal expenses of the candidate, and entirely out of the act, inasmuch as the 22nd section enacts that "the personal expenses of any candidate shall be defrayed by the candidate himself, or by his authority." Then, there is an item of "Half subscriptions to charities, 4*l.* 1*s.* 6*d.*," which we thought somewhat doubtful. But, on looking into the act, we find that expressly excluded by s. 24, which provides that "no subscriptions or contributions *bonâ fide* made to or for any public or charitable purpose, shall be deemed election expenses within the meaning of this act." The next item upon which a doubt arose, was, "Fee to counsel and clerk on case as to annuity, 2*l.* 4*s.* 6*d.*," which was, it appears, a fee to Mr. Lloyd to advise as to the sufficiency of Mr. Guinness's qualification in respect of an annuity. This could no more be applicable to the then approaching election for Barnstaple than to any other election. These two last-mentioned items added to the others make the sum of 21*l.* 18*s.* 9*d.*, for which we think the verdict ought to stand.

The remaining question is, whether the plaintiff is entitled to a verdict in respect of the residue of his claim. We are of opinion that he is not; for, we think, in the terms of the plea, that the plaintiff did not send in any bill, charges, or claim in respect of the same, to an authorised agent of the candidate, in compliance with the statute. The bill was delivered to the "agent for election expenses." Considering who framed this act, one cannot but observe that it is by no means plain: it

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is not easy to understand who is the agent meant by the act: the 16th section, however, says, that "all persons, as well agents as others, who shall have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims, within one month from the day of the declaration of the election, to such candidate, or to some authorized agent of such candidate acting on his behalf, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof." Then comes the 17th section, which provides that all bills, charges, or claims which may have been sent in to the candidate "or his agent in that behalf," shall within a certain time be sent to the election auditor, whose duties are defined by the 18th and subsequent sections. The statute does not say that the agent to be appointed under s. 31, is the person to receive bills: on the contrary, he is to pay money demands, and no more; for, s. 25 expressly enacts that "any candidate, and his agents by him appointed in writing according to the provisions of this act, may, at any time before the day of nomination, pay any lawful and reasonable expenses in respect of the election which he or they shall bonâ fide believe fit and proper to be paid in ready money, and the payment of which cannot conveniently be postponed,"—an account of such payments being sent to the election auditor. It follows, then, that there must be another agent. We think the agent to receive the accounts is a different person from the "agent for election expenses;" and that this bill has not been duly delivered, within the terms of the plea. The result is, that the verdict must be reduced, and that the defendant is entitled to succeed on the second plea, as to so much of the plaintiff's demand as comes within the principle of this decision.

I am reminded by my Brother Willes, that, it by no

means follows from what I have said, that the agent for election expenses may not also be the agent for receiving bills, if properly constituted.

The verdict, therefore, will be entered for 21*l.* 18*s.* 9*d.*

Rule accordingly.

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WILLIAM STRONG, Registered Public Officer of THE
NORTHAMPTONSHIRE UNION BANKING COMPANY, *v.*

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Nov. 23.

THIS was an action by the plaintiff as one of the registered public officers of The Northamptonshire Union Banking Company, upon a joint and several promissory note for 150*l.* drawn by the defendant and one Samuel Smeeton (since deceased) on the 3rd of June, 1851, and payable to the Northampton Union Bank, or order, six months after date.

The defendant pleaded,—first, that he did not make the note,—secondly, payment; and he afterwards obtained leave to add the following:—

Thirdly,—“And for a further plea by way of an equitable defence, the defendant says that he made the said note at the request of the said Samuel Smeeton as his surety, to secure a debt due to the said banking company from the said Samuel Smeeton, and save as aforesaid there never was any value or consideration for the

note from the defendant as surety only; that the plaintiffs, whilst holders of the note, without the knowledge or consent of the defendant, for a good and valuable consideration, gave S. time for payment of the note, and forbore to enforce payment thereof; that they could and might and ought to have obtained payment from S. had they required it, and not given him time for the payment; and that the defendant had been and was by means of the premises damaged:—

Held, that proof that the plaintiffs had funds to the credit of the principal debtor shortly after the bill became due, and had abstained from applying those funds in discharge of the note, or from communicating to the defendant for three years the fact that the note remained unpaid,—did not sustain either the plea of payment, or the equitable defence set up by the third plea.

To an action on a joint and several promissory note of the defendant and one S., payable to the plaintiffs at six months after date, the defendant pleaded,—secondly, payment,—thirdly, by way of equitable defence, that he made the note at the request and as surety for S., to secure a debt due from S. to the plaintiffs (a banking company), and without value; that the plaintiffs took the

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defendant's making the said note; and the said note was delivered to the banking company, and accepted by them from the defendant as surety only for the said Samuel Smeeton, and they then had notice and knowledge of the same having been so made by him as such surety: And the defendant further says that the said banking company, whilst holders of the said note, without the knowledge or consent of the defendant, for a good and valuable consideration in that behalf, gave the said Samuel Smeeton time for the payment of the said note beyond the time when the same became due and payable, and forbore to enforce payment of the same during that time, and the said banking company could and might and ought to have obtained payment from the said Samuel Smeeton of the said note, and all moneys due thereon, had they required payment of the same, and not given the said Samuel Smeeton time for the payment of it, and the defendant has been and is by means of the premises damaged."

Fourthly,—“ And for a further plea the defendant says that the said note was made upon the terms and in consideration that the said banking company should advance to the said Samuel Smeeton money on the security of the same; and the defendant further says that the said banking company did not at any time advance any money to the said Samuel Smeeton on the security of the said note, and the consideration for the making the said note has failed, and, save as aforesaid, there never was any value or consideration for the making of the said note.”

The plaintiff took issue upon each of these pleas.

The cause was tried before Jervis, C. J., at the sittings at Westminster after last term. The facts were as follows:—Smeeton had banked for many years with Messrs. Whitburne, the predecessors of The Northamptonshire Union Banking Company, one Biggs becoming surety

for him to the extent of 150*l.*, by signing a joint and several promissory note for that amount, which was renewed from time to time. In June, 1851, the last renewal becoming due, and Biggs declining to continue to be surety, Smeeton got the defendant to join him in the note declared on, which he sent to the banking company inclosed in a letter informing them that it was in exchange for Biggs's note, and that the amount would be paid off at maturity. This note was never entered in the pass-book to the debit of Smeeton : and, when it became due on the 6th of December, 1851, the balance in the books of the company was against Smeeton ; but, within ten days after, there was a balance of about 250*l.* in his favour.

Upon these facts, it was submitted on the part of the defendant, that the note must be considered as paid ; or that, at all events, the company were bound in equity to apply the first moneys of Smeeton's which came to their hands after the maturity of the note, to its discharge, or to give the surety prompt notice of its non-payment.

His Lordship thought the evidence did not sustain the plea of payment, and disclosed no equitable defence : he therefore directed the jury to find a verdict for the plaintiff for 157*l.* 10*s.*, the amount of the note and interest.

Byles, Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection, there being evidence to go to the jury on the third plea, and that the verdict was against the evidence on the third plea. He submitted, that, though, as between the principal debtor and the creditor, the evidence disclosed a case of set-off only ; yet, as between the creditor and the surety, who had a right to expect that the bill would be placed to the debit of the principal debtor, it clearly amounted to payment. [*Crowder*, J. Placing it to the debit of the principal would not make it pay-

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ment. *Jervis*, C. J. You clearly cannot at law vary the contract which appears upon the face of the note.] As an universal rule, that does not hold. [*Jervis*, C. J. I speak with reference to the action upon the written contract.] Suppose there had been an express agreement between the banking company and the surety, that the bill when due should be placed to the debit of the principal debtor, it would, if that had been done, have amounted to payment, as between them. The question is, what had the surety a right to expect the banking company to do under the circumstances [Crowder, J., referred to *Manley v. Boycott*, 2 Ellis & B. 46.] Then, the third plea clearly discloses a state of facts which would afford a defence in a court of equity. *Law v. The East India Company*, 4 Ves. 824; *Newton v. Chorlton*, 2 Drewry, 333. [*Willes*, J., referred to *Davis v. Stainbank*. (a)]

The rule was granted on the last point only.

Knowles and *Field* shewed cause. The defendant, no doubt, signed the note in question as surety for the running account of Smeeton with the banking company. The defence attempted to be set up by the third plea, is, that the defendant, as surety, is discharged by reason of time having been given to the principal debtor. But there clearly has been no such giving of time here as will discharge the surety at law,—viz. under a binding contract to forbear to sue for a definite period: and there are abundant authorities to shew that the rule in equity is the same. The case of *Law v. The East India Company*, 4 Ves. 824, has little or nothing to do with the question: the Master of the Rolls (Sir R. P. Arden) expressly declined to decide whether the sureties were discharged. The rule is thus broadly laid down by Lord Eldon in *Samuell v. Howarth*, 3 Meriv. 272, 277,—

(a) Not reported as to this point.

"The liabilities of sureties are governed by principles which have been long settled in equity, and are now adopted in courts of law : I say *now*, because the court of Common Pleas formerly held a different doctrine. But at present it is firmly established that the same principles which have been held to discharge the surety in equity, will operate to discharge him also at law. However, as the same relief is to be obtained in both, a court of equity will not send a party who is suing here to a court of law, for the discharge to which he is equally entitled in this place. The rule is this,—that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety ; that is, if time is given by virtue of positive contract between the creditor and the principal,—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not ; and because he in fact cannot have *the same* remedy against the principal as he would have had under the original contract." That is exactly applicable to the case now before the court. The rule is similarly laid down in *Heath v. Key*, 1 Y. & J. 434, where it was held, that a court of equity will not relieve a surety by bond, upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. *Perfect v. Musgrave*, 6 Price, 111, is an extremely strong authority, and almost identical with the present case. There, one Sowden had kept a banking account with the plaintiffs. In the year 1811, they required security from him, when he deposited with them certain title-deeds, and prevailed on the defendant to join him as a surety in a promissory note for 400*l.* at twelve

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months after date, which he gave them. Soon after that note became due, Sowden and the defendant gave the plaintiffs another joint note at twelve months after date (14th April, 1813), in exchange for the note which had become due, and Sowden still continued to keep a running account with the bank, and in the course of that year paid in very large sums. In January, 1815, Sowden compounded with his creditors (including the plaintiffs) at 10*s.* in the pound. The defendant in the mean time never heard anything about the note. In 1816, one Slater demanded payment of the note, as holder, from the defendant; and several months afterwards the plaintiffs brought this action. Wood, B., at the trial, ruled that the above facts shewed no defence to the action. A new trial was afterwards moved for, when it was contended, that, after what had passed between the parties, the surety had become discharged, either by the laches of the plaintiffs, or by their altering his situation in consequence of their subsequent transactions with Sowden, without the privity, concurrence, or knowledge of the defendant; that the plaintiffs should have demanded payment of the note when it became due, and before any subsequent increase of credit had been given to Sowden; that they should not, by lying by, have deprived the plaintiff of the chance of recovering over from Sowden, which he might at that time have had, Sowden having since gone to America; and that the plaintiffs, having become party to the composition deed, and received the amount of their composition of 10*s.* in the pound on their whole debt, could not now recover the remainder, or, if they could, it would be a fraud on the other creditors, parties to the deed: and the cases of *English v. Darley*, 2 Bos. & P. 61, *Rees v. Berrington*, 2 Ves. jun. 540, and *Gould v. Robson*, 8 East, 576, were cited. But the court were clearly of opinion that the defendant was not discharged,—holding, “that, as to the first point, the onus

was on him to take care that the note was satisfied; that the situation of the defendant had not been changed to his prejudice; but that what had been done by the plaintiffs in accepting the composition of 10*s.* in the pound, had operated in favour of the defendant, and was for his advantage to that extent, as much as if they had received so much money from him in part payment, and no prejudice affecting the defendant in any other respect was shewn by evidence; and that the time which had elapsed between the note becoming due and the demand made on the defendant for payment, and the want of earlier notice, were not objections to an action against him as the joint drawer of the note." Again, in *Wright v. Simpson*, 6 Ves. 714, 734, Lord Eldon says: "As to the case of principal and surety, in general cases, I never understood, that, as between the obligee and the surety, there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives time, there the surety has the benefit of it. But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor." In a case of *Newton v. Chorlton*, 2 Drewry, 338, 338, Vice-Chancellor Wood says: "The surety has a right to put the creditor in motion at all times against the principal debtor; and it is on that ground that all these cases are decided. As to granting time, therefore, if the creditor does any act whatever by which he is prevented from complying with the request of the surety, of being put in motion at any time the surety may think fit against the principal debtor, that also will discharge the surety, because he has disabled himself from what I have here called, adopting the language of Sir Samuel Romilly (a), the implied contract. All that is settled, however, by the decided cases, as re-

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(a) In the case of *Craythorne v. Swinburne*, 14 Ves. 160.

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gards the contract between the surety and creditor, is this,—the surety has a right at any moment to every security held by the creditor at the date of the contract ; it has never yet gone beyond that. And he has further a right to say,—you must hold yourself in a position to be placed in motion at my request against the principal debtor.” These cases conclusively establish that the mere forbearing to sue the principal debtor, will not discharge the surety in equity any more than at law. It is, however, by no means conceded that this was a contract of suretyship at all. The defendant and Smeeton, as joint makers of the promissory note, were both principals, as between them and the bank.

Byles, Serjt., *Terrell*, and *Brewer*, in support of the rule. It is not contended on the part of the defendant that time was given to Smeeton in the sense of tying up the hands of the creditors, so as to discharge the surety *at law* ; but that it was the duty of the bank to place the note to the debit side of Smeeton’s account, and, if they had done so, it would have been satisfied by the balance in Smeeton’s favour within a few days after the maturity of the note. It clearly was their duty so to apply the balance in their hands, or to give notice to the defendant,—who by the letter sent to the bank with the note inclosed were informed that the defendant was a mere surety,—that the note was dishonoured. It is worthy of remark that this note was not payable on demand, as is usual in these cases when it is intended to remain as a security for a running balance ; but a note payable at a given date, with an intimation accompanying its deposit that it was intended to be paid at maturity. Courts of equity have given to the relations of principal and surety an effect more extensive than that which they have in a court of law. This was a contract by Smeeton to pay the note at the end of the six months, and an under-

taking by the defendant, that, on Smeeton's default, he would pay it. [*Jervis*, C. J. The legal operation of the note is, that both the makers promise absolutely to pay it. And, according to the more recent authorities in equity, the rule there is, I conceive, the same. The Lords Justices certainly so thought in *Davis v. Stainbank*, though that case was ultimately decided upon another point.] In equity, no form of contract is permitted to disguise the real facts. [*Williams*, J. The question is, whether it is not an implied element in the transaction, that the surety shall be treated as a principal.] The note, standing by itself, might import a joint and several liability of the two as principals; but, coupled with the letter in which it was inclosed, it is manifest that it was a case of principal and surety. [*Jervis*, C. J. There was no evidence that the bank took the defendant as surety.] Both at law and in equity it is a condition to the creditor's right to sue the surety, that he shall have done nothing to prejudice the latter. Giving time to the principal discharges the surety. To that rule, courts of law impose this limitation, that time must be given by a binding contract. No such limitation of the rule, however, is known in equity. So, as to collateral securities,—in equity, the surety is entitled to the benefit of all collateral securities which the creditor had at the time of the contract: but courts of law do not recognise that. Anything which prejudicially affects the position of the surety, in equity discharges him. A familiar illustration of this is found in Sir Samuel Romilly's argument in *Craythorne v. Swinburne*, 14 Ves. 160 (adopted and repeatedly referred to by Lord Eldon), where he says that the whole doctrine of principal and surety, with all its consequences, of contribution, &c., rests upon the established principles of a court of equity, not upon contract, except as it may be so represented upon the implied knowledge of those principles. Another

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instance of the conflict between law and equity upon this subject, is to be found in the case of *The Trent Navigation Company v. Harley*, 10 East, 34. In *Rees v. Berrington*, 2 Ves. jun. 542, Lord Loughborough says: "Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the surety. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety: but, if he could establish that at law, the principle at law is, that he has an interest in the condition; and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety: he does not become bound to answer the engagement at twelve months, where it was to be at six. The principle is a legal principle. In this court they all appear as principals: but, establish the fact that he is a surety, he is surety to a definite, not an indefinite engagement." No such doctrine as that was ever dreamt of in a court of law. *Law v. The East India Company*, 4 Ves. 824, is a very important case, though there was no decision there involving the principle now contended for. Lord Alvanley there said: "There is no doubt, that, upon a joint and several bond, each obligor is a principal at law: but this court makes a wide difference, as justice requires, between principals and sureties. What is the obligation of the surety? Merely that the principal shall duly account, and that he shall pay any balance that may be due from him. The account ought to be settled before the surety is called upon; unless there is fear of insolvency. That is the obligation the sureties supposed themselves to enter into. Instead of that, for six or seven years this matter goes on: no demand is made: one of the sureties withdraws his assets; and the principal himself is permitted to do so. I give no opinion whether the sureties were discharged; as will probably

be contended hereafter, if the company think fit to institute any suit. *Nisbet v. Smith*, 2 Bro. C. C. 579, and *Rees v. Berrington*, 2 Ves. jun. 540, are very strong authorities in favour of sureties. Where any act has been done by the obligee that may injure the surety, the court is very glad to lay hold of it in favour of the surety." The reasoning in that case is precisely and pointedly applicable here; for, unless the bank were bound to apply the balance in their hands to the liquidation of the overdue note, all that his Lordship there says about implied contract in favour of the surety, would be idle. *Calvert v. The London Dock Company*, 2 Keen, 638, is also a very strong case. A contractor undertook to perform certain works, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work: and it was held, that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. Lord Langdale, M. R., said: "In this case, the company were to pay for three fourths of the work done every two months: the remaining one fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work if he did not: and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors having

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in their hands one fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship." And his Lordship goes on to say, that, though such a defence would not be recognised in a court of law, it was a good equitable defence. So, in *Capel v. Butler*, 2 Sim. & Stu. 457, a surety was held to be discharged, where by the neglect of the creditor some of the securities for the debt were lost. These cases shew how much more extensive the obligation of the creditor towards the surety is in equity than it is at law. [*Jervis*, C. J. Do you say, that, in equity, simple forbearance on the part of the creditor to sue the principal debtor discharges the surety?] In a court of equity, the whole facts would be set out, and the appropriate remedy prayed. The point arose in *Ex parte Hanson*, 12 Ves. 346. [*Jervis*, C. J. That was a question of set-off, which is quite beside this case.] The point again arose in *Ex parte Hippines and Harrison*, 2 Glyn & J. 93. At the time of the bankruptcy of Sikes, Snaith, & Co., bankers, Harrison was a creditor of the bankrupts for 1500*l.* on a cash balance, and the bankrupts had in their hands two bills drawn by Harrison on Hippines, for 1338*l.* 7*s.* 9*d.*, which Hippines had accepted for the accommodation of Harrison, and which Harrison had discounted with the bankrupts, and which were not due at the time of the bankruptcy. On the petition of Hippines and Harrison, the court of bankruptcy ordered the bills to be delivered up to Harrison in part discharge of the cash balance, with liberty to prove for the difference. Sir John Leach, V. C., said: "Harrison, being a creditor for a sum of 1500*l.*, insists that the assignees ought not to proceed against Hippines for the recovery of the amount of the two bills accepted by him for the

accommodation of Harrison, amounting to 1338*l.* 7*s.* 9*d.*, because the recovery in that action would be substantially to recover the amount from Harrison, who will be bound to repay it to Hippins. *On these two bills Harrison is, in effect, the principal debtor, and Hippins the surety*; and, as Harrison would have a right of set-off, if the action were brought against him, the assignees were not to be permitted to proceed against Hippins for the purpose of defeating that right, but must deliver up those bills to Harrison in reduction of the cash balance, leaving him at liberty to prove for the difference. This case is directly within the principle of *Ex parte Hanson*." [Willes, J. Do you contend, that, if a set-off arises between the principal debtor and the surety after the bill was due, it extinguishes the debt as between the creditor and the surety?] Yes. [Jervis, C. J. That is a startling proposition, and would require some authority to support it. My Brother Willes refers me to a case of *Hollier v. Eyre*, 9 Clark & F. 1, where Lord Cottenham says (p. 45), "The question whether the plaintiff, as between himself and the grantees, was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves: no extraneous evidence is admissible for that purpose."] No doubt a man may contract himself out of his situation of suretyship. Here, in the letter which inclosed the note in question, Smeeton expresses a hope that the bankers will be satisfied with Foster's security. The money paid in by Smeeton to his account after the maturity of the note was never specifically appropriated by him: the bankers were at full liberty to apply it to the payment of the note, and, as between them and the defendant, it is submitted that they were bound so to apply it. They had no right to convert a liability to pay 150*l.* at a particular time, into a continuing guarantie, determinable only by

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the statute of limitations. By so doing, they prejudiced the defendant's position, and he is therefore entitled, in equity at least, to say he is discharged. In *Murray v. M'Inerheny*, 1 Curteis, 576, A. and B. having appointed C. their attorney for the purpose of taking administration with the will annexed of D., for their use and benefit, and C. having taken out such administration, and entered into the usual bond with two sureties,—the ecclesiastical court refused to permit the bond to be attended with for the purpose of being put in suit against the sureties by A. and B., they never having called for an inventory and account from C., and having given him three years to pay the balance which was due to them under the administration, and he having in the mean time died insolvent. Sir Herbert Jenner said that “the parties interested having shewn such a degree of acquiescence in the non-payment of the money, it would be inequitable at this time to call upon the surety.”

JERVIS, C. J. I am of opinion that this rule should be discharged. There is some little difficulty in disposing of the matter, from the course the argument has taken; for, the counsel for the defendant have almost entirely abandoned the defence attempted to be set up by the plea. There are several points upon which it becomes necessary to say a word or two. In the first place, it was said that the defendant was a surety only for the debt of Smeeton, and therefore entitled to his rights as surety; and that the bank by what they have done have discharged him. I must confess that I very much doubt,—though it is unnecessary to decide the point,—that the defendant is a surety at all; for, I think, as Lord Cottenham says in *Hollier v. Eyre*, 9 Clark & F. 45,—and the rule is the same at law and in equity,—

* that the question whether a party is principal or surety must be ascertained by the terms of the instrument

itself, without the aid of extraneous evidence. You must look to the contract the parties have entered into, and cannot vary it. Now, there was no evidence here that this was a contract of suretyship at all. The man who takes an accommodation bill, knowing that it is an accommodation bill, takes it meaning to have two principals to look to for the payment; and he who puts his name to an accommodation bill does so intending to become a principal debtor. There was no evidence here that the defendant was a surety only, except the fact of the letter of the 3rd of July, from Smeeton to the bank, which announced to them that which is well known in all cases of accommodation bills, that Foster was an accommodation joint drawer, and that, as between those two, Smeeton was the party who was intended to pay the note. Does that raise any contract of suretyship so far as concerned the bank? or does it shew that they intended to deal with him only as such? It seems to me that it is nothing more than the common case of an accommodation bill. The accommodation acceptor is liable as if the acceptance had been an ordinary commercial transaction. I doubt very much whether the defendant could be permitted to go into the transaction in an action upon the note: but I am satisfied that there is no evidence that this was anything more than the ordinary case of an acceptance for accommodation; and, therefore, if necessary, I should have no hesitation in determining that point in favour of the plaintiff.

Then, assuming that this *is* a case of suretyship,—I take the rule in equity to be the same as the rule at law, viz. that mere forbearance on the part of the creditor to sue the principal debtor, will not release the surety. This is distinctly laid down by Lord Eldon in *Samuell v. Howarth*, 3 Meriv. 272. The mere fact of the creditor remaining inactive, is not enough to enable the surety to say that time has been given to the principal debtor, and

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that therefore he is discharged. What has been done here to alter the situation of the parties? Foster was bound to pay the note when at maturity. It was his duty to inquire whether Smeeton had paid it, if he had reason to believe that he would do so. Nothing has been done by the bank, that I can see, to change the rights or liabilities of the parties. The defendant has not been prejudiced by any act of theirs, or prevented from enforcing any remedy he was entitled to.

But a new proposition is now started, which was not suggested as the principal defence. Assuming that Foster was a surety, and that there was no giving of time to the principal debtor, it is said, that, as there was at one time a balance in the bankers' hands in favour of Smeeton, they were bound to appropriate it to the discharge of the note; and for this two cases were cited, viz. *Ex parte Hanson*, 12 Ves. 346, and *Ex parte Hoppins and Harrison*, 2 Glyn & J. 98. These two cases, however, do not seem to me to sustain the proposition for which they were cited. Here, the note was never entered in the account at all: the rule as to adjusting balances, therefore, does not apply. In what other character, then, could the bankers be bound? Unless they took upon themselves the duty of placing the note to the debit of the principal debtor, and there is a difference between this and the ordinary case of an acceptance for accommodation, the bankers were not bound to pay it; though, when once paid, the payment would have enured for the benefit of the surety. In *Ex parte Hanson*, at the time of the bankruptcy of Castell and Powell, Hanson and Williamson were indebted to them in a joint bond, the former as principal, the latter as surety; and Hanson was a creditor upon them on his separate estate. The assignees having brought an action upon the bond, Hanson presented a petition, praying that he might be allowed to set off, and prove for the balance. And Lord

Eldon said: "I am not obliged in this case to do more than courts of equity were in the habit of doing before the statute of set-off existed, which statute was made only to prevent circuity. Suppose the bankruptcy had not occurred: a plea of set-off could not have been put in to an action by the bankers; but, the moment they obtained judgment, Hanson would have brought an action, and, if the surety had paid the joint debt, would have repaid him by the money recovered in that action: if Hanson himself had paid it, he would then have been re-imbursed; and, if they had paid in moieties, they would have divided it. So the thing would have been just as if no action had been brought. Without the aid, therefore, of the extraordinary principle of fraud, which governed the case of *Ex parte Stephens*, 11 Ves. 24, there is a clear principle that decides this case,—that assignees in a bankruptcy take subject to all equities attaching upon the bankrupt; and, as the condition of the bankrupts, if they had continued solvent, would, as between them and these persons, be such as I have represented, that must be the condition of the assignees." So, in *Ex parte Hoppins and Harrison*, the simple question was, whether, where the principal debtor was also a creditor under the bankrupt's estate, the surety might not come and say,—adjust the accounts as between the bankrupts and my principal, and give me the benefit of a set-off which he would be entitled to. The court in effect treated the whole as one account, to avoid circuity of action. These cases shew that the bankers *might* have paid the note; but there are none that shew they were *bound* to pay it. It would be essentially altering the position of parties, to establish, that, because a banker who holds a note of a third person for a customer, has a balance in his hands in the customer's favour at the maturity of the note, such third person is thereby discharged, if it turns out that the note was

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given by him as surety. There is no authority in equity for any such position : and none certainly in law. For these reasons, I am of opinion that this rule should be discharged.

WILLIAMS, J. I am of the same opinion. Mr. Terrell, to whom the court is much indebted for a very ingenious argument, has contended that there is a material difference between the doctrines of law and equity upon the subject of the rights of sureties. It is not necessary to go into that general inquiry upon the present occasion : it is enough to say, that, so far as regards the subject matter of this third plea, there is no such difference as is suggested. But, assuming that there is this difference, it has been doubted whether in any case one who puts his name as principal to a bill or note can in law say that he did so as surety only : it may be that he is allowed to say so in equity, though I must say I think there is considerable difficulty in making out that proposition, inasmuch as that would be incompatible with the positive contract on the face of the instrument. Assuming, however, that this would afford a good equitable defence, if it were proved that the defendant made the note in the character of surety only, and was accepted in that character by the bankers when the note was given to them, I am of opinion that that was not made out. There was no evidence that the note was given by Foster in the character of surety, in the sense the cases cited mean,—not merely that Foster signed the note in that character, but that the banking company agreed to take it from him in the character of surety only. There was no evidence of any such agreement. The letter which is relied on only shews that the bankers at the time they received the note, knew that Foster signed it intending only to be surety. That is all. The plea is evidently founded upon *Manley v. Boycott*, 2 Ellis & B. 46.

The next material averment in the plea, is, "that the said banking company, whilst holders of the said note, without the knowledge or consent of the defendant, for a good and valuable consideration in that behalf, gave the said Samuel Smeeton time for the payment of the said note beyond the time when the same became due and payable, and forbore to enforce payment of the same during that time." What I understand by a giving of time in such a case is this,—The surety has a right at any moment to go to the creditor, and say, "I have reason to suspect the principal debtor to be insolvent, therefore I call upon you to sue him or to permit me to sue him." If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety. The case would then fall within the general doctrine as to principal and surety, which equally obtains in law and in equity, that, if the creditor does any act to alter the position of the surety, he thereby discharges him. There is no pretence for saying that time has been given in that sense in the present case. The plea then goes on to state that "the said banking company could and might and ought to have obtained payment from Smeeton of the said note, and all moneys due thereon, had they required payment of the same, and not given him time for the payment of it, and the defendant has been and is by means of the premises damaged." I am clearly of opinion that that discloses nothing which either at law or in equity furnishes any defence. It might be that the transaction was such as to raise an implied contract on the part of the banking company to use due diligence to enforce payment of the note by Smeeton at its maturity; and that the plea would afford a good defence if that were so, and the banking company had failed to perform that contract. But, supposing that to have been the defence intended to be set up by this plea, it fails in proof. The

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next question is, whether these averments can be taken to amount to an allegation of set-off. The plea does not affect to put forward any such defence. But, assuming that that defence would be open on this plea, I am of opinion that there is no foundation for the supposition that the circumstance of a set-off existing in favour of the principal debtor after the obligation has become complete, amounts to a discharge of the surety. The learned counsel for the defendant, though challenged to produce an authority to that effect, failed to do so. As to the notion of appropriation, in accordance with *Bodenham v. Purchas*, 2 B. & Ald. 39, and that class of cases, it is enough to say that the note never appeared in the account at all. Upon the whole, therefore, I am of opinion that the plea fails in proof, and consequently that the rule must be discharged.

CROWDER, J. I also am of opinion that this rule ought to be discharged. It is unnecessary to consider the question which arose in *Manley v. Boycott*, 2 Ellis & B. 46. It is unnecessary also, in the view I take, to determine the question discussed by Mr. Terrell, whether it would be competent to the defendant, in equity, to shew the existence of suretyship, which is not disclosed upon the face of the instrument itself. Before I took upon myself to decide that question, I should like time to consider and to look into the authorities. I must confess I have always been under an impression that the rule in law and in equity upon that subject was the same. The plea alleges that the defendant made the note as surety at the request of Smeeton. I agree with my lord and my Brother Williams that there is no sufficient evidence to shew that the defendant was a surety. At the utmost there could only be evidence for the jury of that fact. But, upon the assumption that this plea discloses a good equitable defence, and that

there *was* proof that the defendant was a surety only, I am clearly of opinion that what was done by the banking company did not operate his discharge. The plea is framed on the position that the surety is discharged by time having been given to the principal debtor: and it is only upon that ground of defence failing that recourse is had to certain words in the plea to raise a defence of a different character. But still the plea throughout makes the giving of time the very essence of the defence. I have always understood that the giving of time which discharges a surety, supposes a state of things where the creditor has by some binding contract precluded himself from enforcing his remedy against the principal debtor, as but for such contract he might have done. What are the facts here? A joint note is signed by the defendant and Smeeton, payable at a given date. It was the duty of the defendant, assuming that he was a surety, to see that the principal debtor was duly called upon to pay the note. It is said that the facts proved shewed that the banking company might and ought to have obtained payment of the note from Smeeton, and that their omission to do so in equity discharges the surety. That, I think, is going very much further than any case has ever yet gone. I agree with my Lord Chief Justice in thinking that the two cases of *Ex parte Hanson*, and *Ex parte Hippins and Harrison*, are inapplicable. And, as to the fact that the banking company "could and might and ought to have obtained payment of the note from Smeeton," the circumstances are these: Smeeton had a running account with the bank, on which the balance was for a few days subsequent to the maturity of the note in Smeeton's favour. The moneys, however, which constituted that balance were paid in by Smeeton on the drawing account, in which that note never was entered. So far, therefore, from there being any obligation on the banking company to pay the note

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out of that balance, I am of opinion that they could not properly have done so.

WILLES, J. I concur with the rest of the court in thinking that this rule ought to be discharged. The first question is, whether the defendant in this case is in the condition of a surety. An accommodation acceptor has many of the rights of a surety. He is discharged by a payment by the drawer. He has a right *in equity* to the benefit of securities given by the person accommodated to the holder. Also, it is competent to him to shew that there was no consideration, or that it has failed, or what the consideration was, or the purpose for which the bill was handed over. These are familiar doctrines. But you cannot shew by parol evidence that the contract of a party to the bill or note was intended, at the time it was made, to be other than that which is apparent on the face of the instrument itself. And the rule upon this subject ought to be the same in equity as at law. That seems to have been the opinion of Lord Eldon, in *The Bank of Ireland v. Beresford*, 6 Dow, 233. I am quite aware that there are cases in equity which hold that the true nature of the transaction which parties have entered into may always be shewn. One instance of that kind was referred to a few days since in this court,—a case of *Langton v. Horton*, 5 Beavan, 9, where it was held, that a person who had granted an absolute bill of sale of a vessel, might establish by parol evidence that it was given only for the purpose of securing a debt, and might redeem. But the proceeding in that case was not upon any contract contained in the bill of sale: it admitted its existence and operation, and the instrument was no estoppel as to the *purpose* for which it was given. A similar explanation was allowed to be given in *Myers v. Willis*, antè, p. 77. Here, however, we are dealing with an action upon a promissory

upon the face of which the defendant appears to
 und contracts as, a principal debtor. A person who
 s a note as a principal debtor, must, in proceedings
 the note, undergo all the liabilities of a principal
 or, although, as between himself and the party at
 se instance he signs it, he is in fact a surety only,
 that fact was known to the creditor at the time
 note was handed over. This is laid down in the
 ises on bills: and the cases of *Fentum v. Pocock*,
 unt. 192, 1 Marsh. 14, and *The Bank of Ireland v.*
sford, 6 Dow, 233, are referred to. *Fentum v.*
ock expressly decided, that, where the holder of a
 of exchange accepted for the accommodation of the
 er, took a cognovit from the drawer for payment by
 lments, he did not thereby discharge the acceptor,
 her the holder at the time of taking the bill knew
 it was an accommodation bill or not. It is sup-
 d that Lord Eldon, in *The Bank of Ireland v.*
sford, expressed a doubt upon that: but I think it
 be found that he adopts the view taken by Sir
 es Mansfield and the rest of the court of Common
 s in that case. In *Ex parte Glendinning*, 1 Buck's
 . 517, Lord Eldon did express a doubt, founded
 the practice in bankruptcy, that accommodation
 es are allowed to prove as sureties against the
 es of their principals. But, in truth, when you look
 the distinction in those cases,—that there the proof
 t upon the bill or note, but upon the contract to
 mnify in consideration of accepting or making it,—
 will be found to be entirely consistent with
um v. Pocock. In the latest case upon the subject,
ley v. Boycott, 2 Ellis & B. 46, a plea like this
 held bad, because it contained no averment that the
 itor agreed to take the person who upon the face
 he instrument contracted as principal, as a mere
 ty. That seems to me to be in precise accordance
Hollier v. Eyre, 9 Clark & F. 1, in the House of

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Lords. The result seems to be, that, here, if evidence is admissible to shew that the defendant signed the note as surety, it must also be shewn that the bankers agreed to accept him as such: and consequently, that, in the present case, where there was no such evidence, the defendant is not entitled to be treated as a surety, and the defence does not arise. Whether such a contract by parol, contemporaneous with the note, if proved, would control the writing, is a question upon which I need not in this case pronounce any opinion. (a) As to what was said on the part of the defendant, that, if a set-off arises between the creditor and the principal debtor, the liability of the surety on the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers. If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested, that, when a note given under circumstances like these falls due, and there is a balance in favour of the customer at the time, that balance must of necessity be applied to the discharge of the note. Where the security is passed into the account, of course it follows the rule in *Bodenham v. Purchas* and that class of cases. For these reasons, I entirely concur with the rest of the court in thinking that this rule should be discharged.

Rule discharged.

Byles, Serjt., on behalf of the defendant, asked leave to appeal, the leave of the court being necessary for that

(a) See *Adams v. Wordley*, 1 M. & W. 374.

purpose because the point was not reserved at the trial. (a)

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JERVIS, C. J. I do not think the plea raises the point upon the record. At the same time, though we all entertain so clear an opinion, I for one have no objection of an appeal.

Knowles suggested, that, if allowed to appeal, the defendant should be called upon as a condition to pay into court a sum of money sufficient to cover the costs. The amount of the bill and interest had already been paid in.

WILLIAMS, J. The whole court entertaining so confident an opinion that the defence does not arise, I must protest against any leave to appeal being drawn into a precedent.

It was ultimately arranged that the defendant should have leave to appeal, upon bringing into court 150*l.*, to cover the costs, within a week. The condition, however, was not complied with, and consequently the appeal was not prosecuted.

(a) See the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 34, 35.

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NETHERWOOD v. WILKINSON.

Upon a motion for an attachment against a witness for not attending pursuant to a subpoena, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to her husband a notice which had been left with her, requiring his attendance in court on the following morning, and the witness swearing that he did not receive the notice, and did not wilfully disobey the process of the court,—the rule was discharged, but without costs.

JOYCE, on a former day in this term, obtained a rule nisi for an attachment against John Pickford, for not attending as a witness on the trial of this cause in pursuance of a subpoena. The affidavits upon which the motion was founded, shewed that Pickford was duly served with a subpoena in this cause on the 12th of June last, and on the 13th with notice (which was delivered to his wife at his residence) that his attendance at Westminster would be required on the 14th; that Pickford, at the time of such service, told the person who served him that he would be engaged on that day to drive to the Hampton races; that, the cause being about to be called on on the 14th of June, and Pickford not being in attendance, a messenger was sent to his residence, who was told by Pickford's wife that he was absent from home; that Pickford was duly called as a witness, but did not appear; and that, in consequence of his non-attendance, he being a material and necessary witness, the plaintiff was obliged, under the advice of counsel, to consent to the jury being discharged as to one of the issues, the costs of which were consequently disallowed on taxation.

Prentice now shewed cause, upon an affidavit of the witness Pickford and his wife. Pickford swore, that, at the time he was served with the subpoena, he told the plaintiff, who was present, that he could do him no good at the trial, as the horse, the subject of the action, so far as he knew, was perfectly quiet to ride and drive, and that he hoped he would not force him to attend, as he was engaged to drive for the week to Hampton races,

nd would be a great loser if he did not go ; and that he attorney's clerk thereupon said that he (deponent) eed not attend at Westminster until he saw them gain ; that deponent returned home from Hampton aces very late in the evening of the 13th of June, and ft home again on the 14th, but did not receive the otice from his wife, nor did she inform him that there as one, or that he was required to attend at Westminster Hall on the 14th ; that deponent was told by is wife on the 15th of June that he had been sent for n the previous day, and that she told the person who alled that he was driving an omnibus to Hampton aces, and would not return till late at night ; that, a w days afterwards, the plaintiff called on the deponent nd told him it was all right, and that he was not equired at the trial, and that he (the plaintiff) had btained a verdict, whereupon the deponent told him, at, if he (deponent) had been put into the witness-box, e must have lost the verdict ; that the deponent had ever given his evidence either to the plaintiff or his ttorney ; that, if the plaintiff and the attorney's clerk ad not told him that he need not attend as ordered by e subpoena until he saw them again, he would have nployed some person to drive the omnibus in his stead, ad been present at the trial ; and that it was not from y want of respect to the court that he was absent. he wife in her affidavit stated that she remembered the aper being brought for her husband on the 13th of une last whilst he was absent at Hampton races, which id paper she put in a box with other papers for him, as her custom ; that her said husband did not return om the races until late in the evening, and she glected to give him the said paper, and that he left ain the next morning to drive to the said races, with- it seeing the said paper, or being informed that he as required to attend at Westminster ; and that she

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remembered a gentleman calling on the 14th of June, and stating that her husband must go directly to Westminster, as the trial would come on, and she then told him, as was the fact, that he was gone to Hampton, and would not return until late. It was submitted that there was no pretence upon the affidavits for charging the witness with having intentionally evaded compliance with the mandate of the court.

Joyce, in support of his rule. (a) It is manifest from the affidavits filed in answer to the rule, that the witness was guilty of an intentional disregard of the subpoena, and that, in consequence of his absence, the plaintiff has sustained loss.

JERVIS, C. J. I am of opinion that the rule must be discharged. The motion is founded upon a supposed contempt of the process of the court. I think it is quite clear that the witness was guilty of no intentional contempt. The wife, it appears, did not communicate to her husband the notice which was left with her on the 13th of June. But, under the circumstances, I think the rule should not be discharged with costs, inasmuch as the fact of the notice not having come to the hand of the witness was not known to the plaintiff at the time the rule was moved.

The rest of the court concurring,

Rule discharged, without costs.

(a) He asked time to answer the "new matter," under the 45th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125: but the court held that there was no ground for it.

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GODTS v. ROSE.

Nov. 23.

TROVER for "casks of oil and a certain order in writing for the transfer and delivery of oil."

Pleas, not guilty, and not possessed.

The cause was tried before Jervis, C. J., at the sittings in London after last term. The facts were these:—On the 12th of March last, a contract was entered into between the plaintiff and the defendant as follows:—

"London, March 12th, 1855.

"Bought for account of Mr. W. A. Rose, of Mr. H. A. Godts, five tons of first quality foreign refined rape-oil, at 53s. per cwt. Usual allowances. To be free delivered and paid for in fourteen days by cash, less 2½ per cent. discount.

"G. Soames & Son, Brokers."

The sale was not of specific oil; but the plaintiff had oil answering the description in the contract, lying at Humphrey's wharf. The contract having been entered into, the plaintiff went to the wharfinger, and gave him an authority to transfer certain casks of oil into the defendant's name, and sent a clerk to the defendant's counting-house with an invoice and a receipt for the amount, with directions to ex-

A., having a quantity of rape-oil at Humphrey's wharf, contracted to sell five tons thereof to B. The bought-note was as follows:—"Bought for account of B., of Mr. A., five tons of first quality foreign refined rape-oil, at 53s. per cwt.; usual allowances: to be free delivered and paid for in fourteen days in cash less 2½ per cent. discount."

A. sent an order to the wharf directing the wharfinger to transfer into B.'s name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a

transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer order to B.'s counting-house, and offered them to him, at the same time demanding a cheque for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered.

In trover by A. against B. for the oil and the transfer order,—Held, that, under the circumstances, neither the property nor the right to the possession thereof passed to B.

Seemle, that, upon the true construction of the order, the seller was not bound to deliver the oil without payment of the price; but that, at all events, the defendant's counsel having, on cross-examination of one of the plaintiff's witnesses, elicited from him that that was the understanding of such contracts in the particular trade, the defendant was bound by it.

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change them for a cheque. The clerk accordingly took the documents to the defendant, who, though informed that they were not to be left without payment, having obtained possession of the transfer order, refused to give a cheque. The plaintiff's clerk thereupon went back to the wharf, and desired the wharfinger not to act upon the order: to this the wharfinger at first assented; but he afterwards altered his mind, and delivered the oil to the defendant; whereupon this action was brought.

A witness who was called to explain the meaning of the contract, stated, that the understanding of the trade was, that, upon such a contract, the seller had fourteen days to deliver the goods, and the buyer fourteen days to pay the price after delivery; but, on cross-examination by the defendant's counsel, he stated that it was customary to require payment on delivery.

On the part of the plaintiff, it was submitted, that the property in the oil did not pass to the defendant by the mere order given to the wharfinger to transfer it into his name, until that order had been communicated to and assented to by the defendant; and that it was competent to the plaintiff to recall the order, unless the defendant assented to the terms which he thought fit to impose.

It was put to the jury whether or not the plaintiff intended to part with the property in the oil, without receiving a cheque. They found that he did not.

The learned judge nonsuited the plaintiff, but with leave to move to enter a verdict for the value of the oil (about 265*l.*), if the court should be of opinion, that, under the circumstances, the property did not pass.

Byles, Serjt., having, on a former day in this term, obtained a rule nisi accordingly,

Raymond (with whom was *E. James*) now shewed cause. To entitle him to maintain this action, ~~the~~

plaintiff must shew that he is entitled to the property in the goods, and also to the immediate possession of them. Under the bought and sold notes here, it is submitted, both the property and the right to immediate possession passed to the buyer. Two cases have put a construction upon a contract of this sort, viz. *Staunton v. Wood*, 16 Q. B. 638, in the Queen's Bench, and *Spartali v. Benecke*, ante, Vol. X, p. 212, in this court. In *Staunton v. Wood*, the plaintiffs contracted to sell to the defendants cable bars at a certain price per ton,—“the said goods to be delivered forthwith to the defendants at the works, and the said price to be paid by the defendants in cash in fourteen days from the time of the making of the said contract:” and it was held, that the delivery was meant to precede the payment, and that a readiness on the plaintiffs' part to deliver the goods was a condition precedent. So, in *Spartali v. Benecke*, where a contract for the sale of thirty bales of goats' wool, at a certain price per lb., contained the following stipulation, “customary allowance for tare and draft, and to be paid for by cash in one month, less 5 per cent. discount, it was held, that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month; and that, there being no ambiguity in the language of the contract, evidence was not admissible to shew, that, by the usage of the particular trade, vendors selling under such contracts were not bound to deliver the goods without payment. The contract must speak for itself: it means that the buyer has fourteen days for payment after the delivery of the goods. *Spartali v. Benecke* is not distinguishable from this case. [Willes, J. The words here are, “to be free delivered and paid for in fourteen days.”] As between the vendor and vendee, what passed between the former and the wharfinger is immaterial. [Williams, J. That is upon

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the supposition that the contract gave him a right to the possession of the goods without immediate payment.] His possession is lawful; and the vendor's remedy is for the price only.

Assuming that the right of possession does not pass by the contract, it is submitted that here there was a complete delivery. As soon as the transfer order was delivered to the wharfinger, and he agreed to hold the oil for the defendant, the delivery was complete, and it was not competent to the plaintiff afterwards to say that the defendant's possession was not lawful. In *Swanwick v. Sothorn*, 9 Ad. & E. 895, 1 P. & D. 648, it was held, that, on a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of the goods to him in the warehouseman's book, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as, the weighing of an article forming part of a bulk, and sold by weight: but, if the identity and quantity are ascertained, as, where the oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu; although the delivery order describes the goods by the weight as well as the bin ("1028 bushels of oats in bin 40"), and directs the warehouseman to weigh them over. "Where," said Lord Denman, in delivering the judgment of the court, "the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in *Hammond v. Anderson*, 1 N. R. 69; and, in such case, the transfer in the books of the wharfinger is sufficient." Here, the delivery was complete, and the notice to the wharfinger not countermandable.

Byles, Serjt., and *H. James*, in support of the rule.

It was competent to the plaintiff to retract his offer to deliver the oil, at any time before the defendant's acceptance of it upon the terms and conditions upon which the offer was made. The plaintiff could not have sued the defendant for goods sold and delivered, if the latter had refused to accept the order on the wharfinger; for, the delivery was not complete until the vendee had accepted the wharfinger as his agent. There is a manifest difference between the case of *Spartali v. Benecke* and the present: in that case, nothing was said in the contract about delivery; here, the fourteen days applies to the delivery as well as to the payment. If any doubt could exist on that subject, the parol evidence which was introduced by the other side removes it. Upon this contract, the buyer would have had a right to require the oil to be delivered to him at his place of business. The plaintiff offers to deliver it in a way in which the buyer is not bound to accept it. Although a delivery order was lodged with the wharfinger, it was never absolutely and without qualification communicated to the buyer. There are numerous cases in equity to shew that a deed of assignment by a debtor for the benefit of his creditors, is revocable until communicated to the creditors, so as to create the relation of trustee and cestui que trust. Upon this subject, a leading authority is *Garrard v. Lord Lauderdale*, 3 Simons, 7. And the like was held in *Harland v. Binks*, 15 Q. B. 713.

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JERVIS, C. J. I am of opinion that this rule must be made absolute, and a verdict entered for the plaintiff. Several objections to the maintenance of the action were urged by Mr. Raymond: but, upon consideration, I think that none of them are entitled to prevail. In the first place, it was contended that parol evidence was not admissible to explain the written contract, the terms of which are not in themselves ambiguous or doubtful. I

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think it hardly lies in the mouth of the defendant to take that objection, seeing that the evidence he complains of was introduced by himself. As explained by the evidence, the meaning of the contract is this, that the seller may deliver the oil at any time within fourteen days, and may at the time of delivery require payment. It is said, that, if that be the construction put upon this contract, it will conflict with the decision of this court in the case of *Spartali v. Benecke*, antè, Vol. X, p. 212. But, upon reflection, I think that it is not so. There, the words of the contract were not, as here, "to be free delivered and paid for in fourteen days," but "to be paid for by cash in one month," nothing being said about *delivery*: the presumption therefore was, that the delivery was to take place within a reasonable time. But here the manifest intention of the parties was to shift their position, and to enable the seller to call upon the buyer for payment of the price at or before the delivery of the oil. Each act,—the delivery, and the payment,—was to take place within the fourteen days. If that be so, it removes Mr. Raymond from his second point, viz. that the mere contract of sale passes the property; for, that cannot be, if the buyer is entitled to have the goods only upon paying for them. Then, it is contended in the next place, that there has been a complete and perfect delivery. The facts are these:—The plaintiff having a quantity of oil at Humphrey's wharf, agrees to sell an unascertained and undefined portion of it to the defendant. He accordingly sends his clerk to the wharfinger with an order requiring him to transfer the quantity to the defendant. The wharfinger acts upon that order, and transfers five tons of oil to the defendant's name, and gives the plaintiff's clerk a paper acknowledging his order. The plaintiff's clerk takes the paper to the defendant, and offers to give it to him in exchange for a cheque. The defendant receives the paper,

but refuses to give the cheque. The jury found, that, in thus parting with the paper, the clerk had no intention to part with the property. All these cases of delivery of the symbols of property are founded upon that sort of tripartite contract which is adverted to in some of the cases, between the vendor, the vendee, and the wharfinger. Here, the plaintiff's order was obeyed by Humphrey; but Humphrey made no bargain, and the vendee made no bargain until the paper was delivered over with the intention of parting with the property. The defendant got possession of it by means of a fraud or an accident or mistake, and not with the intention to adopt Humphrey as his agent. The wharfinger seems to have acted upon the notion that the order transmitted to him amounted to an absolute transfer of the property. The distinction now pointed out by my Brother Byles and Mr. H. James was not adverted to at the trial. The plaintiff never in fact parted with the property at all.

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WILLIAMS, J. I am entirely of the same opinion. It is unnecessary to express any opinion upon the construction of the sold-note in this case. This was not a sale of any specific oil: but the seller intended to appropriate to the buyer five tons out of the quantity he had at the wharf, and he sent the wharfinger a transfer order for the purpose of carrying that appropriation into effect. There is no doubt, upon the authorities, that, if that transfer order had been delivered to the buyer, and he had carried it to the wharfinger, and the latter had consented to hold the oil therein specified for him, or if, after the order had been left with the wharfinger by the seller's clerk, the wharfinger had communicated it to the buyer, and the latter had assented to it either tacitly or explicitly, that would have constituted a complete transfer, inasmuch as the transaction would amount to an arrangement between the three,—the vendor, the whar-

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finger, and the vendee,—that the oil should remain in the wharfinger's hands as the agent of the vendee. It is impossible to say that the facts here shew that any arrangement of that kind was come to. The person who took the order from the wharfinger to the vendee was induced to part with it by a species of force. I am clearly of opinion that the property in the oil, notwithstanding what took place, remains in the plaintiff.

CROWDER, J. I am of the same opinion. In order to decide this case, it is not necessary to put a construction upon the sold-note, because it was shewn by the cross-examination of one of the plaintiff's witnesses, that the true construction was, that the delivery of the oil and the payment of the money were to be concurrent acts. That being so, the only question is, whether that which took place amounted to a delivery of the oil to the defendant. The contention on the part of the plaintiff was, that the delivery was to be only on payment of the price. The plaintiff intended that five tons of the oil which he had at Humphrey's wharf should be delivered to the defendant, and he gave an order to the wharfinger to transfer that quantity accordingly. Did that bind the goods, and was it equivalent to a delivery to the defendant? The wharfinger, in obedience to the plaintiff's order, did transfer five tons of the oil to the name of the defendant. Was that transfer operative until the defendant had agreed to accept it? I find no authority to shew that a mere delivery of an order to the wharfinger, or any act done thereon by the wharfinger, has the effect of binding the vendee, without his acceptance. The notice of the transfer was carried by the seller's clerk to the defendant. Up to that time there was no delivery. The demand was, to pay the amount on the delivery of the paper. The defendant took the paper,

but refused to pay the money. There was, therefore, no complete transfer.

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WILLES, J. I am of the same opinion ; and I should come to the same conclusion whatever be the construction of the contract as to the time of payment, for, in the opinion I give, I do not proceed upon the contract, or upon the colour supposed to be given given to it by the cross-examination. If it were necessary to pronounce an opinion upon the construction of the contract, I should have little hesitation in holding it to be, that the seller should have the option of the time of delivery, and that then the buyer should have the goods only upon payment of the price. I, however, proceed upon this ground, that the property in the oil was in the seller at the time of the contract, and that nothing which took place between him and the buyer had the effect of taking that property out of the former and vesting it in the latter. This was not a contract for the sale of any specific and ascertained parcel of oil ; but for five tons out of any oil of the character specified. The contract is simply a contract for the sale of five tons of oil of the description therein mentioned. Now, when one man sells to another goods which are not specifically defined, it is necessary that they should agree upon what is to be delivered in fulfilment of the contract. The seller has the option of delivering, and the buyer of accepting, goods of the kind mentioned, subject to their being of the quality contracted for. In the present case, the seller, for the purpose of doing this, selects certain casks of oil as the oil which he tenders to answer the contract on his part ; and he sends his clerk to the wharfinger with an order to him to hold those particular casks for the buyer, which the wharfinger assents to do. Still, however, there is no assent on the part of the buyer. The seller's clerk then goes to the buyer, and,

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producing the transfer order he had obtained from the wharfinger, offers to give it to him, subject however to the condition that he shall receive a cheque in return. The buyer takes the transfer order, but declines to give the cheque: he does not assent to the appropriation of the particular casks of oil as a fulfilment of the contract, upon the terms upon which alone the seller was content to make it. There was no agreement *ad idem* as to the appropriation, and consequently no property passed. The law upon the subject of the passing of the property in goods by appropriation, is well laid down by Parke, B., in *Dixon v. Yates*, 5 B. & Ad. 34, where he observes upon a note of my Brother Manning. "I take it to be clear," said the learned judge, "that, by the law of England, the sale of a specific chattel passes the property in it to the vendee, without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery, is questioned in *Bailey v. Culverwell*, 2 M. & R. 566, in a note by the reporters: but I apprehend the rule is correct as confined to a bargain for a specific chattel. *Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained:* but, where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is, to vest the property in the bargainee." The property in goods not specific, therefore, certainly does not pass to the vendee until he assents to the appropriation made by

the vendor, and upon his terms. I cannot see that there has been any such assent here. An essential ingredient was wanting, viz. payment. If the seller had no right to impose that condition, the buyer might have had his remedy by action. But, no property passing, the plaintiff retained his right to the oil, and consequently is entitled to a verdict.

Rule absolute.

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UNDERWOOD v. NICHOLLS.

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DEBT for goods sold and delivered. Pleas, never indebted, and payment.

The cause was tried in the sheriff's court, London, on the 12th of July last, before Mr. Russell Gurney. The facts were as follows:—The plaintiff was a wine-merchant in London, having an agent at Windsor, named Cooper, who was in the habit of taking orders for the plaintiff, and who had authority to receive payment for goods supplied in pursuance thereof. The action was brought to recover 18*l.* 15*s.*, being 17*l.*, the price of a quarter cask of sherry, and 1*l.* 15*s.* a balance claimed in respect of a former sale of vinegar. The question was, whether the quarter cask of sherry had been paid for. The defendant stated, that, on or about the 17th of August, 1854, Cooper had called upon him after banking hours, and asked him to cash a cheque for 12*l.*; that, on the 22nd, he met Cooper, who asked him if he had presented the cheque, and, being told that he had not, said that he would re-pay the amount; that he (the defendant) thereupon said, that, as he owed Cooper 17*l.* for the sherry, he might as well settle for it, and accordingly Cooper accompanied him into his house, when he gave Cooper back the 12*l.* cheque and five sovereigns; that

A., as agent for B., sold wine to C., who paid for it by returning to A. his own cheque, which C. had cashed for him a few days previously, and which it appeared had never been presented by C.:—Held,—in the absence of any evidence of ratification by B.,—that this was not, as between him and C., a payment of C.'s debt, although the jury found that the transaction was *bonâ fide*.

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Cooper promised to give him a receipt on the following morning, and did so, but that he had lost the receipt. Upon cross-examination, the defendant admitted that he had on three former occasions cashed cheques for Cooper, and on one of those occasions had not presented the cheque to the bankers. The defendant's statement as to the giving back the 12*l.* cheque and five sovereigns to Cooper was confirmed by the evidence of his wife. There was some conflict as to whether or not the cheque was post-dated at the time the defendant cashed it: but this was denied by him.

On the part of the plaintiff, it was submitted, that, so far as regarded the 12*l.*, there was no evidence of payment, inasmuch as Cooper could have no authority to receive payments on account of his principal otherwise than in money. On the other hand, it was insisted, that, in the absence of fraud, the transaction was a valid payment, and discharged the debt.

The judge thus reported the way in which he put the case to the jury:—"I proposed to leave it to the jury to find whether the cheque was post-dated, and, if not, whether it was paid to Cooper *bonâ fide*, and received by him in payment for the sherry; and that the plaintiff should have leave to move to enter a verdict for 12*l.*, if the court should be of opinion that the payment by a cheque of Cooper was under the circumstances of no avail. *To this no objection was made.* The jury found that the cheque was not post-dated; that the payment was *bonâ fide*; and that it was received by Cooper in payment for the sherry. Verdict for the defendant, with leave to move to enter a verdict for 12*l.* After the verdict was given, Mr. Stammers said that he would not consent to the plaintiff's having leave to move to enter a verdict for him."

Charnock, on a former day in this term, in pursuance

of the leave reserved, moved for a rule nisi to enter a verdict for the plaintiff for 12*l*. The question is, whether the returning to Cooper, Underwood's agent, his own dishonoured cheque for 12*l*., could in law be considered as a payment so as to discharge the debt due from Nicholls to Underwood. The learned judge left it to the jury to say whether the cheque was a post-dated cheque, and whether the transaction was a bona fide one. They found, as to the first, in the negative, and, as to the last, in the affirmative. It is submitted, however, that, notwithstanding that finding, the handing over the cheque, under the circumstances, did not sustain the plea of payment. The duty of an agent authorised by his principal to receive payment, is, to receive it in money only. This is distinctly laid down in Story on Agency, § 98. "An agent authorised to receive payment has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only." So, in *Todd v. Reid*, 4 B. & Ald. 210, it was held, that an insurance broker is only entitled to receive payment for the assured from the underwriter *in money*, and that a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss, is illegal,—the court saying that it was in effect an attempt to pay one person with the money of another. The like was held in *Russell v. Bangley*, 4 B. & Ald. 395, where Abbott, C. J., says: "The general rule of law is, that, if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but, if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged." *Scott v. Irving*, 1 B. & Ad. 605, is to the same effect. And in *Howard v. Chapman*, 4 C. & P. 508, it was held by Tindal, C. J., that a tra-

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 UNDERWOOD customer in the country, is authorised to receive payment
 v. for them *in money*, but not *in other goods*.
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A rule nisi having been granted,

O'Malley and *Stammers* now shewed cause. If there was any evidence upon which the jury would be justified in finding that this amounted to payment, the defendant is entitled to retain his verdict. There was evidence of subsequent ratification. [*Jervis*, C. J. None upon Mr. Gurney's notes.] If the note of the counsel at the trial shews evidence which the judge has omitted to take down, the court will at all events grant a new trial. [*Jervis*, C. J. Certainly not. You might have asked him at the time to leave it to the jury to say whether the payment (by cheque) was afterwards ratified.] The only objection made at the trial, was, that under no circumstances could the giving of a cheque amount to payment = it was contended that it must be in money. Payment by cheque, however, is the common and usual course, and is a complete discharge, if, as here the jury have found it was, made *bonâ fide*. In Paley's *Principal and Agent*, 3rd edit., p. 290, the rule of law is thus stated,—“An agent who has a general authority to receive payments, *which is a matter of evidence*, may, without collusion, receive them in what manner he chooses, so as to acquit the debtor, provided it be such as the course of trade warrants. Thus, where an agent who had the management of Sir C. Thorold's cash transactions, took a banker's cheque in payment of 100*l.* due to his master, and kept it a week, when the banker failed; this was deemed to discharge the debtor, by Holt, C. J., who relied upon the circumstance of the agent having a general authority. Powell, J., was of the same opinion; but, not being satisfied as to the fact of the authority, which it was agreed was more matter of evidence than

of law, a new trial was granted, for the purpose of ascertaining that fact,"—*Sir Charles Thorold v. Smith*, 11 Mod. 71, 88. The case of *Stewart v. Aberdeen*, 4 M. & W. 211, shews that the rule is not so stringent as is suggested on the part of the plaintiff. In his summing up in that case, Lord Abinger "expressed his opinion that the notion had been pushed too far about the actual payment in cash, and that it appeared to him, that, if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank-notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment, if it is done without fraud." And, in giving judgment, his Lordships says: "It must not be considered, that, by this decision, the court means to overrule any case deciding, that, where a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the court is of opinion, that, where an insurance-broker, or other mercantile agent, has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal."

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1855. The present case is clearly within the principle thus laid
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Charnock, in support of the rule. As to what passed at the trial, the court will be bound by the judge's notes. They clearly shew that the objection was properly taken, and that no opposition was made to the reservation of leave to enter a verdict for the plaintiff, until after the jury had found for the defendant. The simple question is, whether an ordinary agent who is authorised to sell goods for his principal, and receive payment, can, instead of money, take the worthless security of his own dishonoured cheque,—or, in other words, write off a debt of his own to the customer?

JERVIS, C. J. (stopping *Charnock*). There is enough upon the learned judge's notes to satisfy me that the point was properly taken at the trial, and that the plaintiff is entitled to have his rule made absolute. The transaction between Cooper and the defendant amounts to no more than the debtor seeking to discharge his debt to the principal by writing off a debt due to him from the agent; which he has no right to do.

WILLIAMS, J. I am of the same opinion. The only doubt I entertained, was, whether the point was properly taken at the trial. It appears from the judge's note that it was.

CROWDER, J., concurred.

WILLES, J. *Primâ facie*, an agent should receive debts for his principal in money. A payment by a cheque the jury would no doubt find to be a payment in the ordinary course of business. The transaction here merely

amounted to the giving back the agent's cheque, which in his hands was a piece of waste-paper. This is not like the case of a usage, as amongst insurance brokers, to set off losses against premiums: and there was no evidence of ratification. It was the simple case of writing off the agent's debt. The question may be different in cases in which the agent, having the offer of money, prefers of his own head to take something else. But this is not such a case.

Rule absolute.

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BROWN and Others v. THOMPSON.

Nov. 26.

THE defendant was discharged under the insolvent debtors act, 1 & 2 Vict. c. 110, in June last. In his schedule, filed on the 4th of April, was inserted a debt of 30*l.* 6*s.*, alleged to be due to "Messrs. Brown & Janson, Bankers, 32, *Clement's* Lane, City," as being a balance due to them on a judge's order in an action upon certain bills of exchange accepted by the defendant. Having been afterwards arrested for the above debt, the defendant obtained a summons for his discharge out of the custody of the sheriffs of London. The summons was attended before Willes, J., on the 2nd of October, who ordered it to stand over until the 5th, the defendant in the mean time to be discharged from custody upon payment of the debt and costs into the sheriffs' hands. The defendant accordingly paid into the hands of the sheriffs 34*l.* 10*s.* The parties again attended before Willes, J., on the 5th of October, when the learned judge ordered that "the amount paid to the sheriffs of London be paid over to the defendant, unless the plaintiffs move to have the money paid to them within the first three days of next term, and obtain a rule of court absolute for that purpose before the last day of next term."

An insolvent in his schedule described a debt as being due to "Messrs. Brown & Janson, bankers, 32, *Clement's* Lane, City:" the correct address of Brown & Janson was, No. 32, *Abchurch* Lane, and the notice of the hearing had been duly served at that place:—Held, that the description in the schedule was a sufficient compliance with the 1 & 2 Vict. c. 110, s. 69.

1855. *Hawkins*, accordingly, on the second day of term, obtained a rule calling upon the defendant, and the sheriffs of London, to shew cause why the sum of 34*l.* 10*s.*, the debt and costs in this action, paid into the hands of the sheriffs by the defendant, should not be paid over by the said sheriffs to the plaintiffs or their attorney, together with the costs of the several applications at Chambers, and the costs of this application, on the ground that the plaintiffs' debt was not truly described in the defendant's schedule, pursuant to the 69th section of the 1 & 2 Vict. c. 110. In the affidavits upon which the rule was obtained, it was stated, that, the plaintiffs had for forty years last past carried on, and still carried on, business together in co-partnership as bankers, at No. 32, *Abchurch Lane*, in the city of London, and not at No. 32, *Clement's Lane*, nor had they during the said period carried on business elsewhere in the city of London; that no notice of the defendant's intention to take the benefit of the insolvent debtors act had been served on the plaintiffs, or on any person in their employ.

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Byles, Serjt., now shewed cause, upon an affidavit of one of the messengers of the insolvent debtors court, who swore that he, on the 9th of April last, duly served a copy of the order for the defendant's hearing before that court on the plaintiffs, by delivering such copy to a clerk of Messrs. Brown & Janson at their place of business situate No. 32, *Abchurch Lane*, Lombard Street, in the city of London; that such copy order was directed to the said Messrs. Brown & Janson at No. 32, *Clement's Lane*, Lombard Street, in the city of London; that the place of business of the said Messrs. Brown & Janson had been known to the deponent as of 32, *Abchurch Lane*, for about four years; that he had on other occasions served similar notices upon them at that

place; and that, had the notice been addressed only "Messrs. Brown & Janson, Bankers, London," he should have served the same at their place of business No. 32, Abchurch Lane, aforesaid. The simple question is, whether the creditors have been sufficiently described in the defendant's schedule. At the most, it is submitted, the description of them as of 32, Clement's Lane, is but *falsa demonstratio*. In *Reeves v. Lambert*, 4 B. & C. 214, the defendant, being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October, 1833: before that time the defendant became insolvent, and presented his petition to be discharged; and in his schedule delivered into the insolvent debtors court, he stated that he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October, 1833: A. had indorsed the bill to B., but the insolvent was ignorant of that fact: B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the insolvent debtors act; and it was held that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of the statute 1 G. 4, c. 119, s. 6. A still stronger case is that of *Nias v. Nicholson*, R. & M. 457. There, in an action against the acceptor of a bill of exchange, who pleaded his discharge under the insolvent debtors act,—it was held that the description in the schedule of a bill as drawn by the defendant and accepted by A. B. (who was in fact the drawer of the bill sued on), and held by C. D. (an indorser on the bill), for the precise sum, and of nearly the same date as the bill sued on, was sufficient description for the discharge of the defendant; the misdescription of the bill not being intended nor likely to deceive the holder.

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Hawkins, in support of his rule. The creditors, it is

1855. submitted, were not properly described in the defendant's schedule. The 75th section of the 1 & 2 Vict. c. 110, enacts that, the previous conditions having been complied with, the prisoner shall be discharged "as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid." By the 69th section, the schedule which the prisoner is to deliver in is required to contain, amongst other things, "a *full and true description* of all debts due or growing due from such prisoner at the time of making such order [the vesting order], and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." That section requires two things,—a full and true description of the debts of the insolvent, and a full and true description of the persons to whom he is indebted. Failing such full and true description, the insolvent is not discharged from the debt. And there is good reason for requiring it. The 71st section requires notice to be given to the creditors. [*Willes, J.* The only question is, whether a sufficient description of the creditors was given here.] The insolvent is to give not only a correct description of his creditors, but also a full and true one. This, it is sub-

mitted, has not been done in the present case. The latest authority upon the subject is, *Kemp v. Hurry*, 24 Law Journ., Exch. 220. There, the defendant had, before his insolvency, given a renewed bill for 26*l.* 7*s.* 6*d.* to Messrs. W., varnish merchants, who, without the knowledge of the defendant, indorsed it to the plaintiffs. One of the Messrs. W. afterwards died. In his schedule the defendant described the debt and bill in these terms:—

“The representatives of Messrs. W. & Co., varnish merchants, late of 134, High Holborn, are, Messrs. Wallis, varnish manufacturers, Long Acre. 30*l.* Admitted: for varnish. These creditors hold a bill of exchange for 30*l.* and upwards, drawn by self and partner, and afterwards renewed by self:” and it was held, that the description in the schedule was defective (under 7 & 8 Vict. c. 96, s. 22), and that the debt was not barred by the discharge of the defendant. In giving judgment, Platt, B., says: “The words of the act of parliament which stood in the way of the insolvent are contained in the 22nd section of the 7 & 8 Vict. c. 96, and there the persons who are to be barred by a discharge under the insolvent act are those who may be indorsees or holders of any negotiable security set forth in the schedule. It, therefore, was a question whether this 26*l.* 7*s.* 6*d.* acceptance was set forth in the schedule. So far from being set forth in the schedule, the bill upon which the action was brought was *accepted* by the defendant, and is described as being *drawn* by him. Instead of being for 26*l.* 7*s.* 6*d.*, it is stated to be for 30*l.*; and therefore there is nothing in the world upon the face of this description which would lead any party to the bill in question, or which would enable any one reasonably to say that it was set forth on the face of the schedule. It is much to be lamented that it was not more correct, because the party who brought this action was aware that the defendant was about to take the benefit of the insolvent debtors act,

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and he stated he was aware of it, but he did not oppose, because he thought it was only throwing good money after bad to oppose. He full well knew the defendant was about to take the benefit of the act, and therefore all the notice required by the act of parliament was substantially given, to bar the creditor. Notwithstanding that the act of parliament required that the instrument should be set forth in the schedule, it is not set forth." That is exactly in point.

JERVIS, C. J. I am of opinion that this rule should be discharged. It is mere falsa demonstratio, and not a misdescription that could mislead any one. Everybody knows where Brown, Janson, & Co., the bankers, carry on their business. I think the description was amply sufficient.

WILLIAMS, J., and CROWDER, J., concurred.

WILLES, J. I am of the same opinion. If a legacy were left to Messrs. Brown & Janson by the description here given, there would probably be no suggestion of misdescription.

Rule discharged. (a)

(a) See *Lambert v. Smith*, antè, Vol. XI, p. 358.

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SIORDET v. KUCZYNSKI.

Nov. 23.

THIS was an action by an indorsee against the acceptor of what purported to be a foreign bill for 100*l*. There was a plea traversing the acceptance.

The cause was tried before Cresswell, J., at the first sitting at Westminster in this term. The acceptance was proved; and it further appeared from the evidence both of the drawer and of the acceptor, that, though dated at a place in Switzerland, the bill was drawn and accepted and passed into the hands of a *bonâ fide* holder for value in London. When drawn and accepted, the bill was unstamped. When produced at the trial, it bore an adhesive stamp of 1*s*., the stamp required to be affixed to a bill of that description by the 17 & 18 Vict.

83. The stamp was obliterated by the initials "H.

N." and the date of "18th August, 1855:" but there was no precise evidence as to when it was affixed.

It was objected, on the part of the defendant, that this was not a bill to which the adhesive stamp could be fixed, that it was not shewn to have been affixed at the proper time, and that the obliteration of the stamp was not made in accordance with the statute. The following causes were referred to,—

Section 3, which enacts that "the duties by this act granted in respect of bills of exchange drawn out of the united kingdom, shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the united kingdom, wherever the same may be payable; and the said duties shall be denoted by adhesive stamps, to be provided by the commissioners of inland revenue for that purpose, and to be affixed to such bills as hereinafter directed."

Under s. 31 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the question whether or not a document offered in evidence is sufficiently stamped, is to be decided by the judge *à nisi prius*, and cannot properly be reserved for the opinion of the court.

17 & 18 Vict. c. 83, s. 3. Bills drawn out of the united kingdom to be stamped with adhesive stamps.

1855.	Section 4, which enacts that "every bill of exchange which shall purport to be drawn at any place out of the united kingdom shall for all the purposes of this act be deemed to be a foreign bill of exchange drawn out of the united kingdom, and shall be chargeable with stamp-duty accordingly, notwithstanding that in fact the same may have been drawn within the united kingdom."
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S. 4. Bills purporting to be drawn abroad, deemed to be so drawn.	
S. 5. The holder of a bill drawn out of the united kingdom to affix an adhesive stamp thereon before negotiating it.	And s. 5, which enacts that "the holder of any bill of exchange drawn out of the united kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, <i>before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill</i> , affix thereon a proper adhesive stamp for denoting the duty by this act charged on such bill; and the person who shall indorse, transfer, or negotiate such bill, shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed, by writing thereon <i>his name, or the name of his firm, and the date of the day and year on which he shall so write the same</i> , to the end that such stamp may not be again used for any other purpose; and, if any person shall present for payment, or shall pay or indorse, transfer, or negotiate any such bill as aforesaid, whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this act to cancel such stamp in manner aforesaid, shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of 50 <i>l.</i> ; and no person who shall take or receive from any other person such bill as aforesaid, either in payment or as a security, or by purchase, or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon and cancelled in the manner hereby directed."
Cancellation.	
Penalty for omission.	

On the part of the plaintiff it was submitted that the

bill was such a bill as might have the adhesive stamp affixed thereon pursuant to the 4th section of the 17 & 18 Vict. c. 83; and that the stamp was duly affixed, and properly cancelled.

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The learned judge ruled that the bill was admissible; but, at the request of the defendant's counsel, he reserved the point for the opinion of the court, if the court should think it one which ought to be reserved.

The jury having found a verdict for the plaintiff,

Byles, Serjt., in pursuance of the leave reserved, obtained a rule nisi for a new trial, or for a nonsuit on the ground that the bill required an ordinary English bill stamp, and that the want thereof was not supplied by the adhesive stamp produced at the trial. [*Jervis*, C. J., referred to the 31st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts that "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp," and observed that there was some difficulty in saying that the court could deal with the question, the legislature having made the judge presiding at the trial the person to determine as to the necessity or the sufficiency of the stamp.]

Holland now shewed cause. The learned judge had no power to reserve this objection for the court. The 31st section of the Common Law Procedure Act, 1854, leaves the matter to his discretion only. And the reason is obvious: the object of the statute,—the protection of the revenue,—would be wholly frustrated if it were otherwise; inasmuch as the court sitting in banc would have no power to carry out the provisions of the 28th and 29th sections. The 28th section enacts, that, "upon the production of any document as evidence at the trial

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of any cause, it shall be the duty of the officer of the court whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp-duty, and the penalty required by the statute, together with the additional penalty of 1*l.*, shall have been paid." And s. 29 enacts that "such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp-duty payable upon or in respect of such document, and of the penalty required by the statute, and of the additional penalty of 1*l.*, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds." And at the end of that section is a proviso, "that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty." There is no officer in this court who could perform that duty. *Eames v. Smith*, 1 Jurist, N. S. 1025, which will be relied on by the other side, differs essentially from this case. There, the parties agreed to take the opinion of the court: Pollock, C. B., says,—“I did not decide the point at the trial, but reserved it for the opinion of the court. The statute says no motion shall be entertained against ‘the ruling of a judge:’ here, there has been no ruling of a judge.” And Parke, B., adds,—“It certainly makes a difference if both parties agree that the opinion of the judge *nisi prius* shall be waived, and that of the court substituted for it.” Here, the learned judge *did* decide the point. Assuming that the judge could reserve the point, it is not raised by the form of the rule. [*Jervis*, C. J

We must not look at the rule as if it were the subject of a special demurrer.] The 4th section of the 17 & 18 Vict. c. 83, was passed for the express purpose of making bills like this foreign bills. The onus of shewing that it was not stamped at the proper time, lay on the defendant: *Crowther v. Solomons*, antè, Vol. VI, p. 758. Then, as to the cancellation. It is said that it was not enough to put the initials of the party cancelling across the adhesive stamp. The statute, however, is a remedial one; and the object it had in view, viz. to prevent the stamp being used again, is as well attained by writing the initials and the date of cancellation across it, as by writing the full names.

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Byles, Serjt, was desired by the court to confine himself to the consideration of whether or not the point was open to him on the statute, and on the form of the rule. This was a document which could not be stamped after issuing, not being a foreign bill; therefore the case comes within the proviso at the end of s. 29, of the 17 & 18 Vict. c. 125. And the case is not within s. 31, because the rule asks, not for a new trial, but for a verdict for the defendant. Here, as in *Eames v. Smith*, it was agreed that the court should do what the judge at nisi prius should have done. [*Jervis*, C. J. No. My Brother Cresswell reports to us that he reserved the point only if the court should think he ought to have reserved it. I think he ought not to have reserved it.] The point was reserved in *Eames v. Smith*. If the construction of the act relied on for the defendant is the correct one, the learned judge was bound to reserve the point. Then, the bill was an inland bill: it was drawn in England, accepted in England, and got into the hands of the first indorsee in England. To enable him to avail himself of the provisions of the 17 & 18 Vict. c. 83, the plaintiff was bound to shew that the adhesive stamp

1855. was affixed to it before it was negotiated. In this the
 SIORDET proof failed. The cancellation also was made in a man-
 * ner not conformable to the directions of s. 5.
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JERVIS, C. J. I am of opinion that the defendant is precluded from raising the objection as to the want of stamp. The learned judge saved the point, subject to the opinion of the court as to whether he ought or ought not to have reserved it. I think he ought not to have reserved it. The rule therefore will be discharged.

WILLIAMS, J. Without quarrelling with the decision of the court of Exchequer in *Eames v. Smith*, I am of opinion that points of this sort ought not to be reserved. If there is enough to induce the judge to admit the document at nisi prius, I think the legislature intended that his decision should be final.

CROWDER, J. I am of the same opinion. *Eames v. Smith* was a very different case from this. It was there agreed between the parties, without any ruling, that the matter should go to the court. Here, we have a ruling, and then a reservation for the opinion of the court, not as to the ruling, but as to whether or not the learned judge ought to have saved the point. I am of opinion that he ought not to have done so, and consequently that the objection is not now open to the defendant.

WILLES, J. The intention of the statute was, that all questions as to stamps should be finally disposed of at nisi prius: and I think that we shall best give effect to that intention, if we hold, that, when once a document has passed the ordeal of an investigation at nisi prius as to its liability to stamp-duty, or the sufficiency of the stamp, it should be subjected to no further discussion. It may be otherwise if the judge rule against the ad-

missibility of the document, and the party offering it in evidence prefers to take the opinion of the court, rather than pay the penalty. Besides, the object of the 17 & 18 Vict. c. 83, was, to protect bonâ fide holders of foreign bills. I think we should be going in the teeth of both statutes, if we were to hold the present objection to be now tenable.

Rule discharged. (a)

(a) See *Tattersall*, App., *Fearnley*, Resp., post, p. 368.

DRAIN v. HARVEY.

DEBT for goods sold and delivered, with a count upon a bill of exchange for 20*l.* drawn by the plaintiff on the 12th of July, 1855, upon and accepted by the defendant, payable three months after date.

The defendant pleaded, to the first count, never indebted; and, to the second count, "for a defence on equitable grounds," that the bill declared on, which purported to have been drawn on the 12th of July, 1855, ought to have been, and was represented by the plaintiff to be, drawn on the 25th of July, and that the action was commenced before the bill would have been due if properly dated.

D. D. Keane, on a former day in this term, obtained a rule nisi to set aside the second plea, on the ground that it was a frivolous plea, and raised no defence in equity. The affidavits upon which he moved, stated, that the plea was false in substance and in fact; that, on the 12th of July, 1855, the plaintiff drew the bill in the declaration and in the second plea mentioned, and sent it by a servant (it then bearing the said date) to the defendant, who returned the same to him by the said servant with

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To a count on a bill, by drawer against acceptor, the defendant pleaded for "a defence on equitable grounds," that the bill declared on, which purported to have been drawn on the 12th of July, 1855, ought to have been, and was represented by the plaintiff to be, drawn on the 25th of July, and that the action was commenced before the bill would have been due if properly dated:—The court set aside the plea, on the ground that it disclosed no equitable defence.

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his acceptance written thereon ; that continually after the bill so accepted had been so returned to him, that is to say, on and from the 12th of July, to the present time, the bill had remained in his possession or in that of the indorsees ; and that the writ of summons in this cause was issued on the 27th of October.

Byles, Serjt., now shewed cause, upon an affidavit of the defendant, who deposed, that, on the 25th of July last, he purchased of the plaintiff two carriages, for 59*l.* 10*s.*, to be paid for in the following manner, that is to say, by cash 19*l.* 10*s.*, by a cab-phæton which the plaintiff agreed to purchase of him for 20*l.*, and by a bill of exchange for 20*l.* at three months from that date ; that the plaintiff then drew a bill of exchange for 20*l.*, which the defendant accepted, and, as he believed at that time, the same was dated on that day, and the plaintiff wrote out a receipt or memorandum according to the before-mentioned agreement, and signed the same in the defendant's presence, which receipt shewed the nature of the contract ; that he, the defendant, thereupon delivered to the plaintiff the cab-phæton, the 19*l.* 10*s.*, and the bill before mentioned ; that the defendant was not, at the time of such contract being made, or on the 12th of July last, indebted to the plaintiff in any sum of money either for carriages or otherwise ; and that the only bill of exchange given by him to the plaintiff was the one before mentioned on the 25th of July last, the date of the said receipt ; and that he was quite taken by surprise, when the bill of exchange the subject of the action was presented, to find that it was dated the 12th of July. In a recent case of *Burgoyne v. Cottrell*, 24 Law Journ. Q. B. 28, which was an action on a bill of exchange, the court allowed the defendant to plead, by way of equitable defence (leaving its validity to be questioned on demurrer), that the defendant was chairman of a company com-

pletely registered under the joint-stock registration act, 7 & 8 Vict. c. 110; that the bill was drawn for the company's purposes, and accepted by the defendant as chairman of the company; that, in order to bind the company, it ought to have been accepted by another director also, and counter-signed by the secretary; that, by mistake or accident, this was omitted to be done; and that it never was intended that the defendant should be bound personally. Crompton, J., there says,—“The notion seems to be, that, in order to support an equitable plea, you must shew some equity that will give a right to an unconditional injunction. Probably equity would not interfere in this case, except upon terms; but I think that there is sufficient doubt about it for me to leave it to be discussed on demurrer. The plea may be added; but the plaintiff may have leave to demur and reply too.” The matter stated in this plea *would* be a defence in equity,—on terms, it is true, but this court cannot say what those terms should be. [*Williams, J.* Would not the only equity be, to make the defendant pay the bill, the plaintiff paying the costs of the action? *Jervis, C. J.* This plea clearly discloses no full equitable defence, and ought not, I think, to be allowed.]

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Byles, Serjt., then proposed to substitute a plea of fraud.

To this the court assented,—*Keene* offering no objection,—the defendant to have a day's time to plead, the *plaintiff's* costs of the rule to be costs in the cause.

Rule accordingly. (a)

(a) See *Wodehouse v. Farebrother*, 25 Law Journ. Q. B. 18.

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The Right Honorable FRANCIS WHEELER, Viscount
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A. held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H. Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood."

In an action against A., alleging for breach,

amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew.

The judge having omitted to leave to the jury upon what terms Parsons had held the farm,—the Court granted a new trial.

THE first count of the declaration stated, that, in consideration that the defendant had, at his the defendant's request, become and was tenant to the plaintiff of a certain messuage, tenement, or farm-house, with the farm-buildings, garden, and appurtenances thereunto belonging, and of certain closes, pieces, and parcels of land adjoining or lying near to the same, at the yearly rent of 275*l.*, to be paid by two equal half-yearly payments, on the 29th of September and the 25th of March in each and every year during the said tenancy, and upon and subject to the terms that the defendant should during the said tenancy, keep, support, and maintain the whole of the said messuage, tenement, or farm-house and buildings, in good repair, and also the mounds and fences of the said farm, and should cultivate the said farm in the same way and manner, or as near thereto as circumstances would admit of, as one Henry Parsons used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood, the defendant promised the plaintiff to pay him the said

rent at the times aforesaid, and during the said tenancy to keep, support, and maintain the whole of the said messuage, tenement, or farm-house and buildings in good repair, and also the mounds and fences of the said farm, and to cultivate the same farm in the same way or manner, or as near thereto as circumstances would admit of, as the said Henry Parsons had used and cultivated the same, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood: Averment of performance of all conditions precedent, and that all things had been done and happened, and that all times had elapsed necessary to entitle the plaintiff to have the benefit of the defendant's promises aforesaid, and the said tenancy existed until a day passed before the commencement of this suit, when it was determined; yet the defendant did not during the said tenancy keep, support, or maintain the said messuage, tenement, or farm-house, and buildings, in good repair, nor the mounds and fences of the said farm, and the same were during the said tenancy ruinous and dilapidated for want of such repair; and the defendant did not during the said tenancy use and cultivate the said farm as near to the way as the said Henry Parsons used and cultivated the same as circumstances admitted; and the defendant did not use or cultivate the same according to the rules of good husbandry used and accustomed in the neighbourhood thereof, and utterly neglected and refused so to do, and the same were and are in a bad state from such default; and the defendant during the said tenancy cut poles and trees on the said farm and premises, such user not being as near to the way and manner in which the said Henry Parsons used and cultivated the same as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the said neighbourhood, and the defendant carried away and sold the said poles and trees.

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The second count stated, that, in consideration that the defendant had, at his the defendant's request, become and was tenant to the plaintiff of a messuage, tenement, or farm-house, with the farm-buildings, garden, and appurtenances thereto belonging, and of certain closes, pieces, or parcels of land thereunto adjoining, at a certain yearly rent, the defendant promised and undertook to use the said messuage, tenement, or farm-house, and buildings and premises, in a tenant-like and proper manner, and to manage, use, and cultivate the said farm according to the rules of good husbandry used and accustomed in the neighbourhood: Averment of performance of all conditions precedent, and that all things had been done and happened, and that all times had elapsed necessary to entitle the plaintiff to have the benefit of the said promises, and the said tenancy existed until a day passed before the commencement of this suit, when it was determined; yet the defendant did not during the said tenancy use the said messuage, tenement, or farm-house, and buildings, in a tenant-like or proper manner, and the same were during the said tenancy ruinous and dilapidated for want of the said user; and the defendant did not during the said tenancy manage, use, or cultivate the said farm according to the rules of good husbandry used and accustomed in the neighbourhood, and utterly neglected and refused so to do, and the said farm and premises were and are in a bad state from such default; and the defendant during the said tenancy cut poles and trees of the said plaintiff's on the said farm, and carried away and sold the same, contrary to the rules of good husbandry used and accustomed in the neighbourhood, and to the promise of the defendant aforesaid.

There was also a count for money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's permission, of messuages and lands of the

plaintiff's, and for money due upon an account stated; and a count for the conversion of poles, trees, wood, beams, and timber.

Pleas,—first (to the first and second counts), that the defendant did not promise or undertake as alleged,—secondly (to the first count), that the defendant did during the said tenancy keep, support, and maintain the whole of the said messuage, tenement, or farm-house and buildings in good repair, and also the mounds and fences of the said farm, and did during the said tenancy cultivate the same farm in the same way and manner, and as near thereto as circumstances did admit of, as the said Henry Parsons had used and cultivated the same, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood, according to the defendant's promise,—thirdly (to the first breach), that the said messuage, tenement, or farm-house or buildings, or the mounds or fences of the said farm, were not, nor was any part thereof, during the said tenancy, ruinous or dilapidated for want of repair, as alleged,—fourthly (to the second breach of the first count), that the said farm was not nor is the same in a bad state from any default on the defendant's part, as alleged,—fifthly (to the third breach of the first count), that the defendant did not during the said tenancy cut poles or trees on the said farm or premises as alleged,—sixthly (to the third breach of the first count), that the said cutting of poles and trees on the said farm and premises was a user as near to the way and manner in which the said Henry Parsons used and cultivated the same farm and premises as circumstances admitted, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood,—seventhly (to the second count), that the defendant did during the said tenancy use the said messuage, tenement, or farm-house and buildings and premises in a tenant-like and

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proper manner, and did during the said tenancy manage, use, and cultivate the said farm according to the rules of good husbandry used and accustomed in the neighbourhood, according to the defendant's said promise,—eighthly (to the first breach of the second count), that the said messuage and tenement or farm-house and buildings were not, nor was any part thereof, during the said tenancy, ruinous or dilapidated for want of such user as alleged,—ninthly (to the second breach of the second count), that the said farm and premises were not nor are they in a bad state from any default on the defendant's part as alleged,—tenthly (to the third breach of the second count), that the defendant did not during the said tenancy cut poles or trees of the plaintiff on the said farm and premises contrary to the rules of good husbandry used and accustomed in the neighbourhood, as alleged,—eleventhly, as to the third count, except as to 137*l.* 10*s.*, parcel of the money claimed for money payable as in that count mentioned, never indebted,—twelfthly, to the fourth count, not guilty,—thirteenthly, to the fourth count, not possessed,—fourteenthly, as to 137*l.* 10*s.*, payment into court.

Replications.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth and thirteenth pleas; as to the fourteenth plea, accepted the 137*l.* 10*s.* in satisfaction and discharge of the cause of action in respect of which it was paid in; and, as to the third count, to which the eleventh plea was addressed, entered a nolle prosequi.

The cause was tried before Willes, J., at the last assizes at Leicester. The facts which appeared in evidence were as follows:—The defendant's father had occupied a farm called the Hog Hall Farm belonging to the mother of the plaintiff, under the following agreement, the defendant succeeding him in the occupation:—

“Memorandum of an agreement made the 17th of November, 1836, between the Right Hon. Jane Dowager Viscountess Hood, of the first part, John Kendall, of Burbage, in the county of Leicester, farmer, of the second part, and Thomas Kendall, of Cussington, in the said county of Leicester, farmer, of the third part, as follows:—

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“The said Jane, Viscountess Hood, hereby lets unto the said John Kendall, all that messuage, tenement, or farm-house, with the farm-buildings, garden, and appurtenances thereunto belonging; and also all those closes, pieces, or parcels of land adjoining or lying near to the same, and commonly called and known by the name of the Hog Hall Farm, situate in the parish of Burbage aforesaid, and now or late in the tenure or occupation of Henry Parsons, or his assignees, for one year from the 25th of March next, and so on from year to year as long as the said Jane, Viscountess Hood, shall live, at the yearly rent of 275*l.*, to be paid by two equal half-yearly payments, on the 29th of September and the 25th of March in each and every year, and the first payment to be made on the 29th of September next: And the said John Kendall hereby agrees to take the said messuage or tenement, or farm-house, closes, pieces, or parcels of land or ground and farm aforesaid, at the said rent, and for the time aforesaid, and to pay the said rent half-yearly as the same shall become due as hereinbefore mentioned; and also to keep, support, and maintain the whole of the said messuage, tenement, or farm-house, and buildings, in good repair, and also the mounds and fences of the said farm, *and to cultivate the same farm in the same way and manner, or as near thereto as circumstances will admit of, as the said Henry Parsons has used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the*

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neighbourhood: And, in consideration of the premises, he the said Thomas Kendall doth hereby guarantee to the said Jane, Viscountess Hood, the regular and due payment of the said rent according to the stipulations aforesaid; and also that he the said John Kendall shall perform and abide by the terms and conditions hereinbefore set forth on the part of the said John Kendall."

The defendant continued tenant of the farm under this agreement, until Lady Day, 1854, when his tenancy was terminated by a notice to quit.

The action was brought to recover damages from the defendant in respect of non-repair of the farm-buildings and fences; for non-cultivation of the farm as Parsons had cultivated it, or according to the rules of good husbandry used and accustomed in the district; and also for cutting and selling ash-poles growing upon the demised premises, contrary to the terms of his holding.

As to non-repair and mis-cultivation.

With respect to the first two breaches, viz. the non-repair of the farm-buildings and fences, and the miscultivation of the land, there was conflicting evidence,—it being sworn, on the one hand, that the premises were considerably dilapidated, and the farm mismanaged; and, on the other, that the premises were left in a reasonable state of repair, and that the farm had been cultivated in the accustomed manner.

As to the poles.

As to the poles,—which consisted principally of young shoots springing from the sides of the old stumps stools of ash trees which had been felled many years previously in certain woods or "spinneys" on a portion of the land demised,—the evidence was in substance as follows:—Prior to Kendall's time, the farm had been in the successive occupations of one Warner, one Shepherd, and one Parsons. Warner became tenant of the farm in the year 1806, and quitted in 1821, having somewhere about the years 1816 and 1817 cut and sold the poles then growing in the spinney in question, which

consisted of about twelve acres. On Warner's quitting in 1821, Shepherd became tenant, and remained so until the year 1833, when he was succeeded by Parsons, who continued to hold the farm until 1836, when the defendant's father came in. Whilst Shepherd was tenant, viz. in the years 1830 and 1831, he also cut the poles for sale,—two thirds of them in the first year, and the rest in the second. There was no evidence that Parsons had ever cut them (except, on one occasion, about half an acre, with the landlord's consent, for the purpose of grubbing up the old stools, and converting the land into arable): but it was proved that poles of this sort were usually considered fit for cutting only about every sixteen or eighteen years.

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When Parsons became tenant, the spinney was valued, Valuation. as between him and the outgoing tenant, at the sum of 50*l.* 9*s.* 6*d.*; the valuation describing it as "twelve acres of spinney, some of them of three and some of four years' growth." This valuation was objected to on the part of the plaintiff, as inadmissible, on the ground that it was a matter passing between the outgoing and incoming tenants in the absence of the landlord; but the learned judge admitted it, reserving leave to the plaintiff to move, should it become necessary.

The rates for the spinney, it appeared, had always Rates. been paid, and the fences repaired, by the tenants. There was no evidence that the spinney was valued from Warner to Shepherd, or from Parsons to the defendant's father when he became the tenant.

There was no evidence that the plaintiff or his predecessor (Lady Hood) had ever cut or claimed to be entitled to cut the poles. But it was proved on the part Custom. of the plaintiff, and not denied by the witnesses called on the part of the defendant, that poles like those in question were invariably understood to belong to the landlord, *in the absence of a special agreement to the*

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contrary. It was further stated by the witnesses for the plaintiff, that spinneys were ordinarily excepted out of farming leases and that to cut poles of this description (without special agreement) was not cultivating in accordance with the rules of good husbandry; and that, in all demises of property belonging to the plaintiff, these spinneys were invariably excluded from the letting.

Summing up.

The learned judge, in his summing up, instructed the jury in substance as follows:—The general rule of law, is, that the landlord is entitled to the timber-trees and the tenant to the bushes or underwood; and the poles in question (ash) would under ordinary circumstances fall under the denomination of timber-trees, and as such belong to the landlord. But, though these young trees may become timber-trees, and belong to the landlord; yet, if they have been habitually, when grown to poles, and become capable of use, cut down by the tenant at a seasonable time, and then allowed to spring up again, and been again cut when of proper growth to be useful, they may assume, as one of the witnesses expressly said, the character of a crop. In a case to which my attention has been called,—*Phillipps v. Smith*, 14 M. & W. 594,—it is laid down by Baron Alderson, that the “cutting even of oaks or ashes, where they are of seasonable wood, that is, when they are cut usually underwood, and in due course are to grow up again from the stumps, is not waste.” It will be necessary to consider two things,—first, the character of these particular poles,—next (and upon this there is much less evidence than might naturally have been expected), how these poles have from time to time been dealt with,—and, further, whether there is any custom of the country affecting the general law with respect to the poles.

Then, after adverting to the evidence, and particularly to the valuation between Shepherd and Parsons, as bearing upon the custom, his lordship continued,—The ques-

tion to be considered; is, whether these poles were what has been called seasonable timber, that is, timber growing from old stools, which from time to time as it sprang up has been cut down and treated as a crop by the successive tenants. Subsidiary to this will be another question, viz. whether this has been done with the knowledge and consent of the landlord. As to this, however, there will be little difficulty; for, if the poles have been continually treated in the way described, it may fairly be assumed to have been done with the landlord's consent. Now, if the poles were of the character already described, and if they were treated as crop by successive tenants, with the knowledge and assent of the landlord, I shall rule as a matter of law that the last tenant, Kendall, the now defendant, was entitled to cut them; because I think there can be very little doubt that Kendall was let in on the same conditions as the former tenants.

Then, there is a further question, viz. whether there is any custom of the country affecting the position in which the tenant stood with regard to these poles. And here it must be observed that it is not the mere practice which prevails with regard to a particular estate that will make custom of the country: it must be an usage generally practised and adhered to,—so general, in fact, as to be ordinarily known and acted upon throughout the country, and understood to form an ingredient in every bargain, without express and particular reference to it.

His lordship then left it to the jury to say,—first, whether the poles were trees or seasonable wood renewing and cut from time to time by the successive tenants of the farm, as crops, and then allowed to grow up again, as crops, from the old stools, until fit to cut,—secondly, whether they had been so treated and used by the successive tenants of the farm, with the knowledge and

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consent of the landlord,—thirdly, whether Parsons took upon the same terms in that respect as the preceding tenants,—fourthly, whether there was any, and what, custom of the country as to cutting such poles upon lands let,—fifthly, whether the farm was used and cultivated by the defendant as Parsons had used and cultivated it during his occupation thereof,—sixthly, the same, as to the poles,—seventhly, whether the farm was used and cultivated in all events according to the rules of good husbandry used and accustomed in the neighbourhood,—eighthly, whether there was any defect of repairs.

After an absence of an hour and a half, the jury returned, and intimated that they were unable to agree upon the points submitted to them.

The learned judge then summed up again, leaving to them the following questions,—first, whether they were satisfied that there was a breach of the agreement as to repairs,—secondly, whether there was a breach of the agreement as to the cultivation of the farm in the same way and manner, or as near thereto as circumstances would admit of, as Parsons had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood,—thirdly, whether the landlord or the tenant was entitled to the poles. And he told them that he thought ash, oak, and elm, were *prima facie* timber-trees; that they might assume the character of a crop, and be cut by the tenant, if the usage had for a series of years, and through a succession of tenancies, been to cut them from time to time as such, and allow them to grow up again from the old stumps; and that, if there was a custom of the country for the landlord to be entitled to the poles, though of that character, such custom would take away the right of the tenant. And he left it to them to say what was the character of these poles, and whether there was a cus-

tom for the landlord to have them, and whether this case was within the custom.

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The jury found for the defendant as to the buildings and as to the cultivation of the farm, and for the plaintiff as to the poles, damages 74*l.* 3*s.* 9*d.*,—saying that there was an *universal custom* that such poles are *not* crops, but belong to the landlord, unless there is a special agreement.

The learned judge thereupon reserved leave to the defendant to move to enter a verdict for him, if the court should be of opinion, that, notwithstanding the custom, the defendant had a right to the poles.

Mellor, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the above verdict should not be set aside, and instead thereof a verdict entered for the defendant, on the ground, that, “under the circumstances of the case as proved at the trial, the tenant was entitled to cut and take the poles,”—or why there should not be a new trial, “on the ground of misdirection of the judge, in not directing the jury to find (and the jury did not find) the terms on which Parsons and the defendant held the farm, with reference to the right of cutting the poles, and on the ground that the verdict was against the weight of evidence on that point.” [*Jervis*, C. J., observed that there was this difficulty in the defendant’s way,—By the terms of the agreement the defendant was to cultivate the farm “in the same way and manner, or as near thereto as circumstances would admit of, as Parsons used and cultivated the same during his occupation thereof, *and in all events according to the rules of good husbandry used and accustomed in the neighbourhood.*” The evidence shews that Parsons never did cut the poles; therefore the defendant is removed from that part of the agreement, and driven to rely upon that part which

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relates to a cultivation according to the rules of good husbandry. Now, as to that, the evidence that tenants prior to Parsons,—the nature and terms of whose holdings are not shewn,—cut the poles when of proper growth, could be no more than evidence for the jury; and the jury have found against the defendant. *Prima facie* these poles,—ash-poles,—would undoubtedly belong to the landlord. The finding of the jury affirms that custom. No doubt, it may be varied by special agreement. But of that there was no evidence in this case.]

Miller, Serjt., on a subsequent day, moved for a new trial, on the ground that the verdict was against evidence, as to the dilapidations and the miscultivation of the farm. But the court directed that this matter should be discussed upon the other motion, without a cross-rule.

Miller, Serjt., and *Field*, shewed cause against the defendant's rule. The premises were let to the defendant under an agreement by which he was to keep the messuage or farm-house and buildings in good repair, and "to cultivate the farm in the same way and manner, or as near thereto as circumstances would admit of, as Parsons had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood." There was, however, nothing in the agreement shewing upon what terms Parsons had held the farm. With respect to the poles, the evidence was as follows:—Two persons, named respectively Warner and Shepherd, had occupied the farm before Parsons. Warner and Shepherd during their respective tenancies, and at intervals of about seventeen or eighteen years, cut the poles for sale: and, when Parsons came in, the spinney, the poles therein being then of about three or

four years' growth, was valued to him from Shepherd at the sum of 50*l.* 9*s.* 6*d.* But there was no evidence to shew that the landlord had any knowledge of that valuation: and, when Parsons quitted after having occupied about three years, there was no valuation to his successor, Kendall. The only other piece of evidence relied on to shew a right in the defendant to cut the poles, was, the payment of rates by him for the spinney together with the rest of the farm. [*Williams, J.* Was it rated as for saleable underwood? *Willes, J.* There was no evidence that the spinney was rated separately at all.] The fact that the defendant paid the rates was treated in the summing up as of no importance. The jury found, that, by the invariable custom of the country, the poles were the property of the landlord, unless there was a special agreement to the contrary. So far as regards the custom of the country, therefore, the plaintiff clearly was entitled to a verdict on the third breach. Then, was there any special agreement here? The agreement is totally silent as to the poles, except in so far as that might be involved in the reference to the mode of cultivation by Parsons. But there was no evidence, neither is there any finding, as to the way in which Parsons did use and cultivate the farm: and it cannot be said that there was any misdirection or mis-carriage on the part of the learned judge, in not telling the jury to find the terms upon which Parsons had held. The jury were distinctly told, that, if the poles were treated as crops by the successive tenants, Warner, Shepherd, and Kendall, and that with the knowledge and assent of the landlord, the defendant would be entitled to cut them: and that was one of the questions specifically left to them by the learned judge. [*Crowder, J.* It seems to have been afterwards withdrawn.] Even if the jury had found that Parsons had a right to cut the poles, the plaintiff would have been entitled to the verdict.

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The construction contended for on the part of the defendant, does not give effect to all the words of the agreement: the defendant was to use and cultivate the farm "in all events according to the rules of good husbandry used and accustomed in the neighbourhood." [Crowder, J: You contend that the agreement means, that the defendant shall use and cultivate the farm according to the mode adopted by Parsons, so that it does not run counter to the custom of the country.] Precisely so. If the terms upon which Parsons held were alone to be imported, there was no necessity for the agreement at all. [Jervis, C. J. It may mean that the tenant was to cut the poles, not unseasonably, but according to the custom of the country, and agreeably to the rules of good husbandry. And that would give effect to the whole agreement.] The jury in effect find that these poles were not to be treated as crops. [Jervis, C. J. Two successive tenants cut them, without any objection on the part of the landlord; the third pays for them at a valuation when he comes in; and his not having exercised the right of cutting is accounted for by the fact that he had not occupied long enough.] He did not claim to be paid for them on relinquishing possession of the farm.

Then, as to the repairs, the verdict was clearly against evidence. [Willes, J. Upon that subject, there was evidence on both sides: and I see no reason to be satisfied with the conclusion to which the jury came.]

Mellor, and G. Hayes, in support of the rule. The main question at the trial, was, who was entitled to the poles,—the landlord, or the tenant? On the part of the defendant, it is submitted that the agreement is to receive the construction suggested by the Lord Chief Justice, viz. that the tenant is to have the poles as the preceding tenants had them, so that they are not cut at

unseasonable and unaccustomed intervals. The jury found that by the universal custom such poles as those in question are not crops, but belong to the landlord, *unless there be a special agreement*. Here there *was* a special agreement, expressing by reference all the terms upon which the prior tenant, Parsons, had held the farm. The evidence shewed a course of user altogether inconsistent with the plaintiff's claim. Warner had cut, Shepherd had cut, and Parsons had the spinney valued to him when he entered upon the occupation. There was also evidence that the spinney was fenced by the tenants, and that they paid the rates for it. [*Williams, J.* What evidence do you rely on to shew that Parsons held on the same terms as the preceding tenants held?] There was no specific evidence as to that: but there was general evidence as to the course of dealing with the poles by all the tenants one after another for nearly fifty years, and no evidence of a single exercise of ownership by the landlord during all that period. The verdict of the jury evidently proceeded on the custom only, without any reference to the question of contract. [*Williams, J.* Suppose the farm had been held by a tenant from year to year, with a right to cut the poles, and he were succeeded by one to whom they are not valued on his coming in,—would the incoming tenant be entitled to cut the poles when at maturity, in the absence of evidence that he came in upon the terms on which his predecessor held? *Jervis, C. J.* Whatever be the opinion of the court as to the construction of the agreement, the rule cannot be made absolute to enter a verdict for the defendant.] At any rate, there must be a new trial on the ground of misdirection. [*Jervis, C. J.* The general question, as to the terms upon which Parsons held, certainly seems not to have been left to the jury.]

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1855. JERVIS, C. J. I am of opinion that the rule should
 LORD HOOD be made absolute for a new trial. Although I am far
 v. from thinking the matter free from doubt, I think the
 KENDALL. better construction of the agreement is this,—that the
 defendant was to hold the farm upon the same terms
 and conditions as Parsons had held it. It was important
 therefore to consider upon what terms Parsons had held
 the farm ; and that is the question which ought to have
 been left to the jury. It is conceded on the part of the
 plaintiff, that, if there was any evidence of the nature of
 Parsons's holding, there should be a new trial. I think
 there *was* some evidence of that, and therefore that the
 rule must be made absolute to that extent.

WILLIAMS, J. I agree with my Lord in thinking
 that there should be a new trial, although I have felt
 some difficulty in coming to that conclusion. Assuming
 that by the custom of the country the landlord was the
 person entitled to the poles; in the absence of a special
 agreement, the question is whether there was any evi-
 dence that the defendant was to have the same rights as
 Parsons, if it was to control the custom. The mean-
 ing of the expression in the agreement,—“to cultivate
 the same farm in the same way and manner, or as near
 thereto as circumstances will admit of, as the said H
 Parsons had used and cultivated the same during his
 occupation thereof,”—goes to the extent of putting
 Kendall in the same position as Parsons as to his right
 in respect of the enjoyment of the profits of the spinney.
 I do not think any doubt can arise upon the other words,
 “and in all events according to the rules of good hus-
 bandry used and accustomed in the neighbourhood.”
 That, I think, means no more than that, treating the
 land as a good tenant should, he will cultivate the farm
 as Parsons cultivated it. The question is, whether these

ords enure to give Kendall all the rights that Parsons had. What was Parsons's position was a question of importance. The inclination of my opinion is that they are. I think there was some evidence for the jury that Kendall was to have the enjoyment of the spinney. The jury declined to give any opinion upon that question, though unexceptionably left to them. Another jury must determine it.

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CROWDER, J. I am of the same opinion. At first, I was inclined to doubt whether the words in the agreement referred to the cutting of the poles. I was inclined to think it meant to refer to ordinary crops. But, upon further consideration, I am now satisfied that it does include the cultivation of the spinney. The farm was to be cultivated by Kendall in the same way and manner, as near thereto as circumstances would admit of, as Parsons cultivated it during his occupation. It was important, therefore, to ascertain how Parsons had cultivated. As to this there was *some* evidence; what amount of evidence, I will not say. The inquiry as to what was done by Shepherd and by Warner was relevant. I think there must be a new trial.

WILLES, J. I concur with the rest of the court in thinking that there ought to be a new trial. When the case was first left to the jury, it occurred to my mind, that, if they should think that Parsons took upon the same terms as the previous tenants, Warner and Shepherd, appeared to have held the farm, viz. on the terms that he should have the right to cut the poles in question when at maturity, and the defendant succeeded Parsons upon the same terms, it would be unnecessary to consider how the custom, if found, could affect the case. The jury thought they could not give any verdict upon that. It seemed to me, that, if the

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point were pressed, there would have been no verdict at all. It was under these circumstances that I proceeded to give the second summing up, which my Lord and my learned Brothers think defective. The question now is, whether, having omitted to leave it to the jury to say what were the terms upon which Parsons had held the farm, I omitted a material element in the summing up. To determine that, it is necessary to put a construction upon the agreement under which Parsons held. I am not satisfied, that, supposing that Parsons entered upon the occupation of the farm upon the terms of his taking the poles when at maturity, there was any evidence, that, when Kendall entered, he entered upon the understanding that he was to hold on any other terms than those contained in the four corners of the agreement. My impression would rather be that the general custom would prevail, and that the landlord would be entitled to the poles, and not the tenant who came in without paying for them. It was admitted that the spinney was not valued to Kendall upon his coming in. The material thing to be considered, was, whether or not he was entitled to them under the agreement. The agreement is, to demise the farm, without reference to the poles. It then goes on to provide for the payment of rent, and the repair of the premises: it further provides that Kendall shall cultivate the farm in the same way and manner, or as near thereto as circumstances will admit of, as Parsons had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood. I thought it was too much to say that these latter words could be construed to give him any right which he would not have had under the preceding terms. That was the ground of my opinion. The first question is, whether these words give Kendall the same rights as Parsons had in

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respect of these poles. The rest of the court think they are to be read with the demise, and to give Kendall the same as Parsons had. My impression is not sufficiently strong to induce me to dissent from that opinion, although it differs from the conclusion I came to at the trial. If that be the true construction of the agreement, it of course became material to consider what were the rights that Parsons had. That was not put to the jury. I think there were circumstances which should have been left to them, and on which they might have come to a conclusion as to that, because it appeared that there was a series of tenants who had preceded Parsons, and who had successively cut the poles as they came to maturity: and it appeared that neither of these tenants had ever been interfered with by the landlord. Parsons, when he came in in 1833, paid a sum of money to Shepherd on the valuation of the spinney, then of some three or four years' growth. Then Parsons, having thus paid for the poles on coming in, continues in the occupation for three years, and when half an acre of the spinney was grubbed up for the purpose of turning it into arable, he was permitted to have the poles for his own use. Under these circumstances, I think I ought not to have come to the conclusion that there was no evidence to be left to the jury on that point. I think not only that there was evidence that was material, but evidence that was relevant also, to shew that Parsons came in under the terms upon which Warner and Shepherd came in: and, if, as the rest of the court think, Kendall had all the rights that Parsons had, it should have been left to the jury to say what those rights were; and that question was finally withdrawn from them. The rule, therefore, will be made absolute for a new trial.

Rule absolute.

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Nov. 26.

WOOD v. COX.

In an action on a promissory note, by indorsee against maker, the defendant pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee to the plaintiff without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant:—The court granted a new trial, without examining whether the direction of the judge was right or wrong.

THIS was an action upon a promissory note for 11*l.*, drawn by Keene, and by him indorsed to the plaintiff.

The defendant pleaded,—first, that Keene did not indorse to the plaintiff,—secondly, that the defendant was induced to make the note by the fraud, covin, &c., of Keene, and without consideration; that the note was indorsed to and held by the plaintiff without consideration; and that he sued on it merely as trustee for Keene.

At the trial, before the undersheriff of Middlesex, the indorsement having been proved, witnesses were called to support the plea of fraud: but, on the close of the case, the undersheriff ruled that there was no evidence of fraud, and directed the jury accordingly. They, however, persisted in returning a verdict for the defendant.

F. Russell, on a former day in this term, upon an affidavit verifying the undersheriff's notes, which disclosed the above-mentioned facts, obtained a rule nisi for a new trial, on the ground that the verdict was perverse.

Prentice appeared to shew cause.

JERVIS, C. J. Without discussing the merits of the case or the propriety of the direction of the presiding judge, I think the verdict cannot possibly be sustained. The undersheriff directs the jury to find for the plaintiff, telling them there is no evidence to support the plea; and they persist in finding for the defendant. There must be a new trial.

The rest of the court concurring,

Rule absolute.

END OF MICHAELMAS TERM.

APPEALS

FROM THE DECISIONS OF REVISING BARRISTERS

(UNDER 6 & 7 VICT. c. 18.)

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

MICHAELMAS TERM,

IN THE

NINETEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES PRESENT AT THE HEARING OF THESE APPEALS, WERE,—
JERVIS, C. J., WILLIAMS, J., CROWDER, J., AND WILLES, J.

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County of YORK,—West Riding.

THOMAS FLINT, Appellant; EMANUEL BROWN SHARP,
Respondent.

Nov. 21.

AT a court held at Bradford, for the revision of the lists of voters for the West riding of the county of York, Emanuel Brown Sharp was objected to as not entitled to have his name inserted in the list of voters for the township of Pudsey, in the said riding.

The said list was headed as follows:—"The list of persons claiming to be entitled to vote in the election of knights of the shire for the West riding of the county of York, in respect of property situate in whole or in part within the township of Pudsey."

The list for this township contained a considerable number of names in alphabetical order; and the name of

A notice of objection to a county vote was sent by post, addressed to the voter at "his place of abode as described in the list of voters:"—Held, sufficient; and that it was neither necessary nor proper to add the name of the parish or township contained in the heading of the list.

1855. the party objected to was inserted in the following form in the said list :—

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Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish (or township) where the property is situate, &c., or name of the property, &c. &c.
Sharp, Emanuel Brown.	Lidget Hill.	Freehold houses and land.	Church Lane, Low Town, Robin Lane, and Richard Shaw Lane.

Objection.

The objection to his name being retained on the same list was signed by "Thomas Flint, of No. 11, Springfield Place, Leeds, on the register of voters for the township of Wakefield, in the said riding." It was directed, "Mr. Emanuel Brown Sharp, Lidget Hill," and was duly posted at Leeds.

On the part of the voter, it was urged that the notice of objection was not properly directed; but that it should have been addressed with the addition of "Pudsey," taken from the heading of the list, in which township the voter must be taken to reside, in the absence of any other address.

Decision.

The revising barrister thought this view was correct, and held that the notice was not sufficient. He therefore refused to entertain the objection, and retained the voter's name on the list.

Question.

The question for the opinion of the court was, whether the revising barrister was right in thus deciding on the ground before mentioned. If he was, the voter's name was to be retained; if not, it was to be expunged.

R. Hall, for the appellant. The decision of the revising barrister here was wrong. The contention on the part of the voter was, that the notice of objection was not properly addressed, inasmuch as "Pudsey" was not

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inserted therein. Under the Reform Act, 2 W. 4, c. 45,
 the service was required to be upon the tenant in pos-
 session, or personal. Now, by the 6 & 7 Vict. c. 18,
 service by post is sufficient in all cases. The 100th
 section enacts, "that it shall be sufficient, in every case
 of notice to any person objected to in any list of county,
 city, or borough voters, and in the livery list of the city
 of London, and also, in the case of county voters, to the
 occupying tenant whose name and place of abode appears
 in such respective list as aforesaid, if the notice so re-
 quired to be given as aforesaid shall be sent by the post,
 free of postage, or the sum chargeable as postage for the
 same being first paid, directed to the person to whom the
 same shall be sent, at his place of abode *as described in
 the said list of voters*; and, whenever any person shall
 be desirous of sending any such notice of objection by
 the post, he shall deliver the same, duly directed, open
 and in duplicate, to the postmaster of any post-office
 where money orders are received or paid, within such
 terms as shall have been previously given notice of at
 the post-office, and under such regulations with respect
 to the registration of such letters, and the fee to be paid
 for such registration (which fee shall in no case exceed
 over and above the ordinary rate of postage), as shall
 from time to time be made by the postmaster-general
 at that behalf; and, in all cases in which such fee shall
 have been duly paid, the postmaster shall compare the
 notice and the duplicate, and, on being satisfied
 that they are alike in their address and in their contents,
 shall forward one of them to its address by the post, and
 shall return the other to the party bringing the same,
 stamped with the stamp of the said post-office; and
 the production by the party who posted such notice of
 the stamped duplicate shall be evidence of the notice
 having been given to the person at the place mentioned
 in such duplicate on the day on which such notice would

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in the ordinary course of post have been delivered to such place: Provided also, that, if no place of abode of the person objected to shall be described in the said list, or if such place of abode shall be situate out of the united kingdom, then it shall be sufficient if notice shall be given to the said overseers, and to such occupying tenant as aforesaid (if any), in the case of a county voter, or, in the case of a city or borough voter, to the overseers or to the town-clerk, or, in the case of a liveryman of the city of London, to the secondaries, and the clerk of the particular company to which the person objected to shall belong, as is in each of the said cases hereinbefore required." (a) The way in which the description gets upon the overseers' list, is this,—by s. 3, the clerk of the peace is required to issue his precepts, with forms of notices and lists to the overseers; by s. 4, the overseers are directed, on or before the 20th of June, to publish a notice requiring voters to send in their claims according to the form given in the schedule, which form is to contain the claimant's place of abode; and s. 5 requires the overseers to prepare lists of claimants, "and in every such list the christian name and surname of every claimant, with the place of his abode, the nature of his qualification, and the local or other description of the property, and the name of the occupying tenant thereof, shall be written as the same are stated in the claim." Then the 7th section enacts, that the person objecting shall, on or before the 25th of August, give or cause to be given to the person objected to, or leave or cause to be left "*at his place of abode as described in such list,*" a notice according to the form No. 5 in schedule A. The object of the act was, to get rid of all questions of due diligence, and to throw the onus of description on the person making the claim. [*Jervis*, C. J. If this notice had been directed to "Lidget Hill, Leeds," it

(a) By s. 20.

would still have been contended that it was insufficient, or want of "Pudsey." I am entitled to vote in respect of property at Shipbourne, in Kent,—must a notice be addressed to me at "No. 47, Eaton Square, in the parish of Shipbourne?" The probability is that I should never receive it.]

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J. Addison, for the respondent. The question is, what is the reasonable construction of the act as to the claimant's "place of abode as described in the list of voters." The 7th section provides that the person objecting shall, on or before the 25th of August, give or cause to be given to the person objected to, or leave or cause to be left at his place of abode *as described in the list of voters*, a notice according to the form numbered 5 in schedule A. The same thing was required under the Reform Act, 2 W. 4, c. 45. What would be the reasonable way of dealing with this? Finding Lidget Hill to be in the township of Pudsey, the conclusion would be that Pudsey was the place of the party's abode. [*Jervis*, C. J. How does it appear that Lidget Hill is in the township of Pudsey?] It is the duty of the objector to ascertain the correct address. The legislature did not intend, when by s. 100 they prescribed a further mode of serving notices, to make it less probable that they should reach the hands of the parties for whom they were intended. In the absence of any other address, it must be assumed that the voter resides in Pudsey. If not, it is the voter's own fault that he did not describe his abode more clearly. The leaning of the law would be in favour of the voter. [*Jervis*, C. J. There ought to be no leaning one way or the other.] The objector knows, when he makes the objection to the vote, that it is claimed in respect of property in the township of Pudsey: and, nothing appearing to the contrary, the inference would be,—at all events as against one who

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elects to send the notice by post,—that the voter is resident in the place where his qualification is situate. In *Sheldon*, App., *Flatcher*, Resp, 17 Law Journ. C. P. 34, antè, Vol. V, p. 14, 2 Lutw. Reg. Cas. 11, a notice of objection to a voter for a borough was in the following form,—“To Mr. C. S., 1 Olney Place. Take notice, I object to your name being retained on the list of voters for the borough of Cheltenham;” and was signed,—“J. F, of No. 5 Sherborne Street, on the list of voters for the parish of Cheltenham:” and it was held, that the description of the objector’s place of abode, “No. 5 Sherborne Street,” meant “Sherborne Street, Cheltenham,” and was a compliance with the requirements of the 17th section of the 6 & 7 Vict. c. 18. [*Williams*, J. A borough voter must be resident.] True: but “No. 5 Sherborne Street,” might have been in any one of the five parishes of which Cheltenham consists. Giving a fair and reasonable construction to the act, it is submitted that the objector was bound to make inquiry and give a proper direction to the notice.

JERVIS, C. J. The point we are called upon to decide in this case seems to me to be a very clear one. The revising barrister was mistaken in the view he took. It was urged before him that the notice of objection was not properly directed. The 7th section of the act requires the person objecting, to give or cause to be given to the person objected to, or to leave or cause to be left “at his place of abode as described in the list,” a notice in a given form. The 4th section requires every person claiming to be placed on the register to send in a notice in a certain form, containing the particulars of his place of abode and of the qualification in respect of which he claims to be registered. Accordingly, the claimant in this case delivers in his claim, in which he describes his place of abode as “Lidget Hill;”

and the objector sends a notice of objection addressed to the claimant at that place. That, as it seems to me, is a clear compliance with the act, unless it was requisite to add "Pudsey," which would be manifestly absurd, when it is well known that Lidget Hill is not situate in the township of Pudsey. The point raised by this case has no affinity whatever with that decided in *Sheldon*, App., *Flatcher*, Resp.; and, if it had, that case would rather be an authority in favour of the view I take. The objector is bound to give a correct notice, containing, amongst other things, a statement of his true place of abode. Here, the claimant was bound to state in his claim his place of abode; and he says, in effect, "describe me as of Lidget Hill." In the case cited, although the marginal note seems to assume that the description was helped by the reference to the heading of the list, that is not the foundation of the judgment; for, Wilde, C. J., says "The objector describes himself as of '5, Sherborne Street.' The question is, where is Sherborne Street? To what has the notice reference? Why, to the right of the party to whom the notice is addressed, to have his name retained on the list of voters for the borough of Cheltenham. Both the party signing the notice and the party to whom it is addressed must reside in Cheltenham, or within seven miles of it. Can there be any reasonable doubt, then, that '5, Sherborne Street,' means '5 Sherborne Street, Cheltenham?'" Although it was there urged, in the course of the argument, that the notice might be aided by a reference to the heading of the list, yet the court in giving judgment place no reliance on that. It is satisfactory in this case to observe, that the party really got the notice; for, if the fact had been otherwise, it would doubtless have been so stated. I think the decision was wrong, and should be reversed, and the vote expunged from the register.

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WILLIAMS, J. I am of the same opinion. It is plain that the objector complied with the terms of the 100th section of the act, by sending his notice addressed to the voter at the place of abode as described in the list of voters, unless "Lidget Hill" must be taken to include "Pudsey" at the heading of the list. The question really is narrowed to this, whether Lidget Hill is to be assumed to be within the township of Pudsey. I must confess I do not see any reason why it should be so; for, it does not necessarily follow, that, because the property in respect of which the right of voting arises is locally situate in that township, the voter must reside there. To assume that "Lidget Hill" must mean a place within the township at the heading of the list, would lead to the most manifest absurdity.

CROWDER, J. I am also of opinion that the notice in question was sufficient, and that the decision of the revising barrister was wrong. It appears from the 4th section of the act that it is the claimant's duty to fill up a form of notice to the overseers, containing his place of abode: and by s. 100, the objector may put his notice of objection in the post, addressed to the person objected to, "at his place of abode as described in the said list of voters." It seems to me that the directions of the act have been duly complied with in this case. The voter knows that he is called upon to give a notice which is to contain his place of abode, and he knows that the notice of objection may be sent to him, addressed to that place, by the post. If, then, any mistake or miscarriage occurs through the insufficiency of the statement of his place of abode in the list, it is his own fault.

WILLES, J. I am of the same opinion. It seems to me that this point has already been substantially disposed of by this court in *Allen*, App., *Greensill*, Resp., ante,

Vol. IV, p. 100, 1 Lutw. Reg. Cas. 592. The person who objects to the name of a voter remaining on the register, may either deliver his notice of objection to him personally, or leave or cause it to be left at his place of abode, or send it by post. If he adopts the latter mode of service, under s. 100, he is only bound to post the notice directed to the voter "at his place of abode as described in the list." In *Allen, App., Greensill, Resp.*, the notice was addressed "Edward Greensill, Lower Mitton;" and it was left at "Lichfield Street," in the borough of Bewdley, where the property was situate. It was contended, that, as Greensill had not in fact any place of abode at Lower Mitton, as described in the list, the qualifying property (which was situate there) must be deemed to be his place of abode. But the court held that no such presumption arose, and that the service was insufficient. Wilde, C. J., in delivering the judgment of the court, says: "Greensill's place of abode is described in the list of voters to be 'Lower Mitton.' It appears from the case, that, though his residence once was at Lower Mitton, it had ceased to be so for several years. The statement on the list that Lower Mitton was his place of abode, was the mistake of the overseers. It was contended, that, as Greensill had no place of abode in Lower Mitton, the qualifying property, which was there situate, must be deemed to be his place of abode, and therefore that a service there was sufficient. But the case expressly finds that Greensill had never resided at the office in Lichfield Street. The question therefore is, whether, if the overseers state in the list a place of abode which is incorrect, the rights of the voter are to be affected by a blunder which it is no part of his duty to correct, and in a matter over which he has no control. When the statute describes the duty of the objector in the service of the notice, it gives him the choice of three modes. If he chooses to select service

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at the place of abode as described in the list, he must take the risk of its turning out not to be the true place of abode. He may always guard himself against mistakes by a personal service, or by sending the notice by post. In this case, therefore, as the revising barrister has found distinctly that the office in Lichfield Street is not the place of abode of Greensill, and that he has no residence in Lower Mitton, we think the decision [that the service was insufficient] was correct in point of law, and must be affirmed." That seems to me to be an authority directly in point.

Decision reversed.

County of KENT,—Western Division.

JOHN OLIVER JONES, Appellant; JOHN INNOUS,
Respondent.

Nov. 19.

A notice of objection to a county vote was addressed "to the overseers of the parish or township of B.," without adding the county, as required by the 6 & 7 Vict. c. 18, s. 101. The notice, however, having been found to have reached the hands of the overseers before the 25th of August,—Held, that the notice and service were sufficient.

AT a court held for revising the lists of voters for the Western division of the county of Kent, in the parish of Bethersden, in the same division and county, it appeared and the fact was, that one John Oliver Jones was in the list of voters for the said Western division of the county of Kent, in the parish of Bethersden, in the same division and county, and that the entry of his name, abode and qualification in the said list, was as follows:—

No.	Christian name and surname of each voter, at full length.	Place of abode.	Nature of Qualification.	Street, lane, or other place in this parish, and number of house (if any) where the property is situated, or name of the property, if known by any, or name of the occupying tenant, &c.
7882	Jones, John Oliver.	4, Upper Bedford Place, London.	Freehold land.	Occupation of J. Pearson.

At the said court, John Innous, of Mason's Hill, Bromley, in the county of Kent, who was on the register of voters for the parish of Bromley, in the said division and county, appeared by T. N. R., and produced to the said court stamped duplicate notices of objection, of which the following are copies:—

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“ Notice of Objection.

“ To Mr. John Oliver Jones, of No. 4, Upper Bedford Place, London. Notice to the voter.

“ Take notice that I object to your name being retained in the list of voters for the Western division of the county of Kent. Dated this 20th day of August, 1855.

(Signed) “ John Innous,

“ Mason's Hill, Bromley, Kent.

“ On the register of voters for the parish of Bromley.”

“ Notice of Objection.

“ To the overseers of the parish or township of Bethersden. Notice to the overseers.

“ I hereby give you notice that I object to the name of the person mentioned and described below being retained in the list of voters for the Western division of the county of Kent:—

Christian and surname of the voter objected to, as described in the list or register.	Place of abode as described.	Nature of qualification, as described.	Street, lane, or other like place where the qualifying property is situate, &c., as described in the list or register.
Jones, John Oliver.	4, Upper Bedford Place, London.	Freehold land.	Occupation of J. Pearson.

“ Dated the 20th day of August, 1855.

(Signed) “ John Innous,

“ Mason's Hill, Bromley, Kent.”

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The duplicate notice secondly above set forth was addressed as follows:—"To the overseers of the parish or township of Bethersden, near Tenterden."

The said duplicate notices were respectively stamped with the post-office stamp of London, of the following dates, that is to say, the said notice firstly above set forth, of the 25th of August, 1855, and the said notice secondly above set forth, of the 24th of August, 1855; and the original notices (of which the duplicate notices were produced as aforesaid) were forwarded by the post; and both the said notices would in the ordinary course of post have been delivered on or before the 25th of August, 1855.

On production by the said T. N. R., on behalf of the said John Innours, of the said duplicate notices above set forth, stamped as aforesaid, it was objected on behalf of the said John Oliver Jones, that the secondly above stated notice was invalid and insufficient in law, and that the service thereof was invalid and insufficient in law, on the ground that neither the county nor division of the county to which the same related, was named in the address of the same notice, pursuant to the 101st section of the 6 & 7 Vict. c. 18.

It was proved, on behalf of the said John Innours, that the said last-mentioned notice was duly received by the said overseers of the said parish of Bethersden on or before the 25th of August, in the year aforesaid: but the said John Oliver Jones did not at the said court prove to the satisfaction of the revising barrister that he was entitled on the last day of July, 1855, to have his name inserted in the list of voters for the said Western division of the county of Kent in respect of his qualification described in the said list of voters for the said parish of Bethersden.

Decision of the
revising barrister.

The revising barrister held and adjudged the said notice secondly above set forth, to be valid and sufficient

in law, and the service thereof to be valid and sufficient in law, and thereupon expunged the name of the said John Oliver Jones from the said list.

If the court should be of opinion, that, under the above circumstances, the said secondly above stated notice was invalid and insufficient in law, or that the service thereof was invalid and insufficient in law, then and in either of the said cases the name of the said John Oliver Jones was to be restored to and inserted in the said list of voters for the Western division of the county of Kent, in the said parish of Bethersden.

The cases of fifty-eight other persons whose names appeared upon the lists of voters for the Western division of the county of Kent, and which depended upon the same point of law as the principal case, were consolidated therewith.

Macnamara, for the appellant. The objection to the notice in this case, is, that it is addressed to the overseers of the parish or township of Bethersden, without mentioning the county in which Bethersden is situate. The notice is required to be given by the 7th section of the 6 & 7 Vict. c. 18, which enacts, inter alia, that "every person objecting, shall, on or before the 25th of August, give or cause to be given to the overseers of the poor of the parish or township to which the list of voters containing the name of the person so objected to may relate, a notice according to the form numbered 4 in schedule A., or to the like effect." (a) The question is, whether the notice is a sufficient compliance with the 101st section, which, as to the service of notices, provides, that, "whenever any notice is by this act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any

(a) This form begins "To the overseers of the parish [or township] of ———."

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App.,
INNOCENT,
Resp.

Question.

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one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business, or shall be sent by the post, free of postage, or the postage thereof being first paid, addressed to the overseers of the particular parish or township, naming the parish or township, *and the county*, city, or borough respectively to which the notice to be so sent may relate, without adding any place of abode of such overseers." (a) It is true, the revising barrister has found that the notice was actually received by the overseers in due time.

JERVIS, C. J. That finding puts you out of court. The service is clearly sufficient, and the notice such to be commonly understood, within the proviso in 101. (b)

Welsby, for the respondent, was not called upon.

Per Curiam.

Decision affirmed, with costs.

(a) This provision only applies to the address on the *outside* of the notice, when sent by post.

(b) Which provides that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register

of voters, or in any notice required by this act, shall in any wise abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood."

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County of KENT,—Western Division.

WILLIAM GODSELL, Appellant; JOHN INNIOUS,
Respondent.

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AT a court held for revising the lists of voters for the Western division of the county of Kent, at Maidstone, in the same division and county, on the 10th of October, 1855, it appeared, and the fact was, that one William Godsell was on the list of voters for the said Western division of the county of Kent, in the parish of Barming, in the same division and county, and that the entry of his name, abode, and qualification in the said list, was as follows:—

Christian and surname of each voter, at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish, and number of house (if any) where the property is situate, or name of the property, and the name of the tenant, &c.
William Godsell.	Barming, South Street.	Freehold cottages.	Barming Heath, Thorington and others, tenants.

At the said court, John Innious, of Mason's Hill, Bromley, in the county of Kent, who was on the register of voters for the parish of Bromley, in the said division and county, appeared by T. N. R., and produced to the court stamped duplicate notices of objection, of which the following are copies:—

“ Notice of Objection.

“To Mr. William Godsell, of Barming, South Street.

“Take notice that I object to your name being retained in the Barming list of voters for the Western

A notice of objection to a county vote was addressed “to the overseers of the parish or township of B.,” without adding the county, as required by the 6 & 7 Vict. c. 18, s. 101. The overseers having acted upon the notice,—although it did not appear when it reached their hands,—Held, that the notice and service were sufficient; for, that, in the absence of any finding to the contrary, the court would assume that the overseers had done their duty.

Whether an informality in the notice, or the service thereof, can be waived by the overseers,—*quære?*

1855. division of the county of Kent, dated the 20th day of August, 1855.

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(Signed) "John Innous,
"Mason's Hill, Bromley, Kent.

"On the register of voters for the parish of Bromley."

"Notice of Objection.

Notice to the
overseers.

"To the overseers of the parish or township of Barming.

"I hereby give you notice that I object to the name of the person mentioned and described below being retained in the list of voters for the Western division of the county of Kent :—

Christian and surname of the voter objected to, as described in the list or register.	Place of abode, as described.	Nature of qualification, as described.	Street, lane, or other like place where the qualifying property is situate, &c., as described in the list or register.
William Godsell.	Barming, South, Street.	Freehold cottages.	Barming Heath, Thorington and others, tenants.

"Dated the 20th day of August, 1855.

(Signed) "John Innous,
"Mason's Hill, Bromley, Kent."

The duplicate notice secondly above set forth was addressed as follows,—“To the overseers of the parish or township of Barming, in Maidstone.”

The said duplicate notices were respectively stamped with the post-office stamp of London, of the 24th of August, 1855; and the original notices (of which the duplicate notices were produced as aforesaid) were forwarded by the post, and would in the ordinary course of post have been delivered on or before the 25th of August, 1855.

On production by the said T. N. R., on behalf of the

said John Innous, of the said duplicate notices above set forth, stamped as aforesaid, it was objected on behalf of the said William Godsell, that the secondly above stated notice was invalid and insufficient in law, and that the service thereof was invalid and insufficient in law, on the ground that neither the county nor the division of the county to which the same related was named in the address of the same notice, pursuant to the 101st section of the 6 & 7 Vict. c. 18.

It did not appear whether the overseers of the said parish of Barming had or had not received the last-mentioned notice on or before the 25th of August in the same year : but it was proved to the satisfaction of the revising barrister that the overseers of the said parish did on or before the 29th of August send, pursuant to the provisions of the said statute, a list of the persons objected to on the list of voters for the said parish of Barming, to the clerk of the peace of the said county of Kent, containing the name of the said William Godsell as a party objected to ; and it was also proved to his satisfaction that the overseers of the said parish did on or before the 1st day of September in the same year publish a copy of such list, as directed and required by the said statute.

But the said William Goodsell did not at the said court prove to his satisfaction that he was entitled on the last day of July, 1855, to have his name inserted in the list of voters for the said Western division of the county of Kent, in respect of his qualification described in the said list of voters for the said parish of Barming : and he held and adjudged the said notice secondly above set forth to be valid and sufficient in law, and the service thereof to be valid and sufficient in law ; and he thereupon expunged the name of the said William Godsell from the said list.

If the court should be of opinion, that, under the

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above circumstances, the said secondly above stated notice was invalid and insufficient in law, and that the service thereof was invalid and insufficient, then and in either of the said cases the name of the said William. Godsell was to be restored to and inserted in the said list of voters for the Western division of the county of Kent, in the said parish of Barming.

The cases of sixty-five other persons whose names appeared upon the lists of voters for the Western division of the county of Kent, which depended upon the same point of law as the principal case, were consolidated therewith.

Macnamara, for the appellant. In this case, the revising barrister has not found, as in the last, that the notice of objection reached the hands of the overseers in due time, viz. on or before the 25th of August: but it was proved that the list of persons objected to, which the overseers are by s. 8 required to publish on or before the 1st of September, was duly published by them on or before the 29th of August, and that such list contained the name of the appellant as a party objected to. [*Jervis*, C. J. Suppose the notice were served *personally* upon the overseers on the 28th, and they choose to treat it as good service, and act upon it, would not that do?] It is submitted that it would not: the overseers have no right to waive the performance of a condition required by the statute. [*Jervis*, C. J. At all events, this can only be an inaccuracy of description, which is cured by the provision for that purpose in s. 101.] It is submitted that this is not a case of misnomer or inaccurate description, within the meaning of that section: and, if it were, it is not found that it is so framed or denominated as to be commonly understood.

Welsby, for the respondent, was stopped by the court.

JERVIS, C. J. I think this case is precisely in principle like the last. It is unnecessary to consider whether or not it is competent to overseers to waive an objection to the due service of a notice, because the revising barrister has not found that the notice did *not* come to the hands of the overseers in due time. It was proved that they acted upon the notice: and I apprehend, that, where a public officer acts upon a notice of this sort, it must be assumed, until the contrary is proved, that the notice came to his hands in due time. The decision of the revising barrister must therefore be affirmed.

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The rest of the court concurring,

Decision affirmed, with costs.

County of HERTFORD.

GEORGE PASSINGHAM, Appellant; GEORGE PITY,
Respondent.

Nov. 19.

AT a court held at Buntingford, in the county of Herts, for the revision of the list of voters for the parish of Ashwell, in the said county, George Pitty, of Ashwell, who claimed to vote in respect of a freehold house and land situate in that place, in the following form,—

One who holds *in fee* land parcel of a manor, which by the custom of the manor is conveyed by ordinary assurance, and without any necessity for a licence from the lord, or any enrolment, or surrender and admittance,—is a freeholder within the 8 H. 6, c. 7, although, at the time of acquiring the estate, he acknowledged to hold of the lord “by free deed, fealty, suit of court, &c.”

Name.	Place of Abode.	Nature of qualification.	Street, lane, or other like place where the property is situate, &c., and name of the tenant, &c.
Pitty, George.	Ashwell.	Freehold house and land.	High Street, and Ashwell Field.

was objected to by George Passingham, as not being entitled to have his name retained upon the register of voters for the said county of Herts, on the ground that his tenement was of other than freehold tenure.

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The facts of the case were as follows :—

George Pitty is seised in fee of a house and land above the annual value of 40*s.*, but less than 10*l.*, which were conveyed to him by indentures of lease and release ; and he has been so seised for upwards of twenty years. It was shewn, by the production of the court-rolls, that, at a general court-baron held for the manor of Digswell on the 20th of December, 1838,—in which manor the property in respect of which the qualification was claimed is situated,—the said George Pitty acknowledged to hold the same house &c. of the lord of the said manor, by free-deed, fealty, suit of court, &c., in the following words :—

“ George Pitty. At this court came George Pitty, of Ashwell aforesaid, miller, and acknowledged

Acknowledg-
ment of free
tenure.

Rent, 4*d.*

Relief, 4*d.*

in his own proper person to hold to him and his heirs, of the lord of this manor, by free deed, fealty, suit of court, and the yearly rent of 4*d.*, a cottage in High Street, in Ashwell aforesaid, formerly William Ball's, since Mary Blanchett's, and late Thomas Kirbyshire's : and he paid to the lord of the said manor 4*d.* for a relief due to him for the same : but his fealty was respited.”

No rent since
paid or de-
manded.

Since the acknowledgment of George Pitty, no rent has ever been paid by or ever demanded of him. Only one court has been held for the manor of Digswell since the year 1838.

In the said manor of Digswell, there are several tenants who hold in precisely the same way as the said George Pitty ; and there are also pure copyholders. The tenants of whom George Pitty is one, convey their estates by ordinary assurances, operating either under the common law or the statute of uses. No special form of deed is required ; nor is there any necessity for any express licence from the lord to alien, *nor for the inrol-*

ment of such assurance on the court-rolls, nor for any surrender to be made. Upon every death of, or alienation by, these tenants, the fact ought, regularly, to be presented at some following court or courts : and it appeared from the court-rolls that the lord had by custom a right, after three proclamations made, to compel by distress the new owners to come in and acknowledge free tenure. There is nothing, however, on the face of the court-rolls to shew whether, after the awarding of any distress, any levy was or was not in any instance actually made.

Upon these facts, it was contended on the part of the objector, that the property for which the said George Pitty claimed to vote was not freehold, but came within the 19th section of the 2 W. 4, c. 45 (a), as being of other tenure than freehold, and so that the qualifying property ought, in order to entitle the said George Pitty to a vote, to be of the yearly value of not less than 10*l.* ; and that, as the tenement in question was below such value, the name of the said George Pitty ought to be expunged from the list of voters for the said parish of Ashwell.

On the part of the claimant, it was contended, that the tenement in question was strictly a freehold, subject only to the payment of a fine or quit-rent ; and that the freehold was in the tenant, and not in the lord.

The revising barrister decided that the property was

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(a) Which enacts "that every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any lands or tenements of copyhold or any other tenure whatever except freehold, for his own life, or for the life of another, or for any time whatsoever, or for any larger estate, of the clear yearly value of not less than 10*l.*, over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county, or for the riding, parts, or division of the county, in which such lands or tenements shall be respectively situate."

1855. freehold, and did not fall within the 19th section of the 2 W. 4, c. 45, and that the name of the said George
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 Pitty ought to be retained upon the list of voters for the said county of Hertford.

If the court should be of opinion that his decision was wrong, then the name of the said George Pitty was to be expunged from the list of voters for the said parish of Ashwell; otherwise, it was to be retained.

Shee, Serjt., for the appellant. The question in this case is, whether George Pitty has an estate of freehold, or such an estate as is described in the 19th section of the Reform Act, an estate of other tenure than freehold. The case finds that Pitty is seised in fee of a house and land above the annual value of 40s., but less than 100s., and that they were conveyed to him by indentures of lease and release. But it also finds,—which is totally inconsistent with a seisin in fee,—that, although the tenants of the manor of Digswell convey their estates by ordinary assurances operating either under the common law or the statute of uses, yet, upon every death or alienation by them, the fact ought to be presented at some following court, and that the lord has by custom a right, after three proclamations made, to compel by distress the new owners to come in and acknowledge free tenure; and that George Pitty, when he succeeded to the property, acknowledged to hold it of the lord “by free deed, fealty, suit of court, and the yearly rent of 4d.,” and that he paid to the lord 4d. “for a relief due to him for the same,” and that his fealty was respited. This, though not a strictly correct mode of describing the estate, is nothing more than a customary holding of the manor of Digswell, such as is described by Littleton, in §§ 80 and 81, as base tenures:—“It is to be understood, that, in divers manors, there be many and divers customs in such cases, as to take tenements, and as to

plead, and as to other things and customs to be done, and whatsoever is not against reason may well be admitted and allowed." "And these tenants which hold according to the custom of a lordship or manor, albeit they have an estate of inheritance according to the custom of the lordship or manor, yet, because they have no freehold by the course of the common law, they are called tenants by base tenure." No case can be cited where a tenant of a manor paying rent to the lord, acknowledging himself tenant to him, and owing fealty and suit of court, is properly called a freeholder. There are instances where such a tenant is said to have a freehold interest; but that is where the thing spoken of is a customary tenure, something essentially distinct from and subordinate to a freehold at common law. [*Williams, J.* I thought this point had been long since settled; and that the question whether the party had a right to vote depended upon whether he held the freehold, or only held by copy of court-roll, the freehold being in the lord. A customary freeholder is different from an ordinary copyholder.] Although he does not hold by copy of court-roll, or at the will of the lord, it is submitted the tenant still is not the freeholder. It is a base tenure in the copyholder, and a freehold tenure in the lord: Litt. §§ 91, 172; Co. Litt. 58. a. (a) The description of the tenure in this case is suggestive of services different from the service of the tenants of "folkland," and is thus described in Litt. § 172,—"Tenure in villeinage is most properly when a villeine holdeth of his lord, to whom he is a villeine, certain lands or tenelements according to the custom of the manor, or otherwise, at the will of his lord, and to do his lord villeine service; as, to carry and re-carry the dung of his lord

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(a) As to the distinction between copyholds and customary freeholds, see *Crowther v. Oldfield*, 2 Lord Raym. 1225, 1 Salk. 365, and *Vaughan d. Atkins v. Atkins*, 5 Burr. 2764.

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out of the city, or out of his lord's manor, unto the land of his lord, and to spread the same upon the land, and such like. And some freemen hold their tenements, according to the custom of certain manors, by such services. And their tenure also is called tenure in villeinage, and yet they are not villeines; for, no land holden in villeinage, or villein land, nor any custom arising out of the land, shall ever make a free man villeine. But a villeine may make free land to be villeine land to his lord: as, where a villeine purchaseth land in fee-simple, or in fee-tail, the lord of the villeine may enter into the land, and oust the villeine and his heirs for ever; and after the lord (if he will) may let the same land to the villeine, to hold in villeinage." And it is further described by Lord Coke,—116. b.,—by a reference to Bracton (a), in which he refers not only to the baseness, but to the uncertainty of the tenure, which is no described by the words "at the will of the lord:"—"Purum villenagium est, à quo præstatum servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit." Here, the party is described as holding subject to all the incidents of the customary or base tenure. In *Burrell v. Dodd*, 3 B. & P. 378, it was held, that the customary tenements in the north of England which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called tenant-right, and held of the lord according to the custom, are not within the statutes of partition, 31 H. 8, c. 1, and 32 H. 8, c. 32. In giving judgment, the court say: "The plea alleged as an excuse for the defendant's not making partition, that the premises sought to be divided were not in their nature divisible, being 'parcel of the manor,' and held of the lord as 'tenant-right,' which

(a) Lib. 4, fo. 208.

sufficiently negatived its being freehold, for, that no freehold could, strictly speaking, be said to be *parcel of the manor*." They also referred to Coke's Copyholder, § 32, where, speaking of the various sorts of tenants now known by the name of copyholders, as distinguished from what they were formerly, he observes,—“They were everywhere then called tenants by copy of court-roll, or tenants at will, according to the custom of the manor; which styles import unto us three things,—1. nomen, 2. originem, 3. titulum. First, his name is, tenant by copy of court-roll, for, he is not called tenant by court-roll, but by copy of court-roll, and this is the sole tenant in law who holdeth by copy of any record, charter, deed, or any other thing. Second, his commencement is at the will of the lord, for, these tenants in their birth, as well as the customary tenants upon the borders of Scotland who have the name of tenants, were mere tenants at will, and, though they kept the customs inviolate, yet the lord might sans control eject them: neither was the estate hereditary in the beginning, as appeareth by Britton; for, if they died, their estate was presently determined, as in case of a tenant at will at common law. And, in some points, to this present hour the law regardeth them no more than a mere tenant at will; for, the freehold at the common law rested not in them, but in the lords, unless it be in copyholds of frank-tenure, which are most usual in ancient demesnes.”

[*Jervis, C. J.* There was a distinct averment in that case that the tenements in question, from time whereof &c., were, ‘parcel of the manor of Henshaw, and customary tenements of that manor, and during all that time descendible, and which had descended, from ancestor to heir as of the hereditary right of the tenants called tenant-right, held of the lord of the said manor for the time being, as of that his manor, by divers rents and certain services, according to the custom of the said manor.’”

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1855. *Williams, J.* There is nothing in the case that is at all inconsistent with a free tenure in the voter. *Jervis, C. J.* It is essential to the existence of a manor that there should be free suitors: they are the judges of the court-baron.] In *Burton's Compendium*, § 1282, it is said: "The words in the habendum of the admittance, 'at the will of the lord' (though they have now entirely lost their original sense), are characteristic of those customary estates to which ordinary usage, in opposition to etymology, seems to have exclusively appropriated the name of copyholds." And in § 1283, it is said: "There are other customary estates which in the admittances are expressed to be held 'according to the custom of the manor,' but without inserting the words 'at the will of the lord.' These, though of the same general nature with copyholds, are commonly denominated customary freeholds: but, whatever privileges may be annexed to them, *the true freehold interest in the land is always vested in the lord*, and though, in some instances, a deed of bargain and sale is employed instead of a surrender for transferring the customary estate, yet, as the assurance is imperfect without an admittance in the lord's court, the tenure is properly said to be by copy of court-roll; and by that name only it is excepted in the statute 12 Car. 2, c. 24, s. 7, when other tenures are converted into free and common socage." [*Williams, J.* If the tenements are held by copy of court-roll, it is immaterial whether they are held "according to the custom of the manor," or "at the will of the lord:" the freehold is in the lord. But, what is there to shew that here?] Substantially, this property is held of the lord, according to the custom of the manor. In *Thompson v. Hardinge*, antè, Vol. I, p. 940, it was held that the freehold of customary tenements within a manor, though such tenements be not held at the will of the lord, and are transferrable by lease and release and admittance, is

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in the lord. [*Jervis*, C. J. There, the customary tenements passed by lease and release *and admittance*.] In Blackstone's Considerations on Copyholders,—Law Tracts, 227, 236,—it is conclusively established, that, in all these cases, the freehold is in the lord, and the customary tenants have only a base tenure under him. "The truth is," he says, "that these lands are of such an amphibious nature, that, when compared with mere copyholds, they may with sufficient propriety be called freeholds; and, when compared with absolute freeholds, they may with equal or greater propriety be denominated copyholds." "However the lawyers may at times have denominated these tenures a sort of base species of freehold, in contradistinction to mere copyholds, yet the law in the main regards them as being properly copyhold, and not freehold tenures; else they could not have subsisted to this day: for, they must otherwise have been involved in the general fate of the rest of our ancient tenures, when by the statute of 12 Car. 2, c. 24, they were all abolished and reduced to free and common socage,—except only tenures in frankalmoign, and tenures by copy of court-roll. Free and common socage these tenures cannot be; their surrenders and admittances, their frequent fines for alienation, and their peculiar paths for descent (from which two last, as not being the universal properties, no argument hath been hitherto drawn), their forfeitures, recoveries, and privileges (still regulated by particular custom in derogation of the common law), most clearly evince the contrary. Nor will it be pretended that they are of the nature of frankalmoign. There remains, therefore, no other choice: tenures by copy of court-roll they must be. This is their indelible character: it is to this they owe their present existence, and survival of other tenures. The statute has reduced all manner of lay freeholds to one and the same level, of free and common socage: but

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copyholds remain as they were; as various, as singular, and as servile in their tenure as ever. These tenures, therefore, not being free and common socage, must necessarily remain copyholds, as entirely as in the time of Bracton; of a superior order, indeed, and distinguished by some advantages (formerly real, now nominal only) over the baser sort; but still far short of the dignity, the immunities, and the independence of that freehold tenure which for more than three hundred years has constituted an elector of knights of the shire to serve in the English parliament." The case of *Busher*, App., *Thompson*, Resp., ante, Vol. IV, p. 48,—though relating to lands of burgage tenure,—has some affinity to this case. There, the case found, "that burgage tenements within the borough had always been conveyed by deed of grant, or bargain and sale, without livery of seisin, and without a lease for a year, or any inrolment; that no surrender or admittance was required, nor was any fine paid upon descent or alienation; that the mode of descent was agreeable to the common law, except that females inherited, not as co-parceners, but by seniority; that the interest of a feme coverte was passed without any separate examination of the wife; that the widow of a person dying seised of a burgage tenement had the whole during her chaste viduity; that burgage tenements had always been devisable in the same way as ordinary freeholds; that they were held subject only to the payment of certain fixed annual rents payable to some individual; and that no other services had been performed or payments made in respect of them:" and it was held, that, in the absence of evidence on the face of the case to shew that the freehold was in any other person, it must be assumed that the tenant had such a freehold tenure as to entitle him to be registered. The decision there does not help this case; but some of the remarks of the judges are very applicable to the matter

now before the court. Wilde, C. J., says: "If this form of conveyance may be sufficient to pass a freehold interest, it is competent to the court to give effect to it, in the absence of any circumstances to shew that it is inapplicable to the subject matter of discussion. As far as any evidence appears on the case, it has been the mode of conveyance of these tenements from time immemorial. There is no period at which any services of a base nature were performed; and no evidence that there ever was a manor of which these tenements formed part: but there is evidence that there is no manor existing now, and therefore no lord. When it is argued that the party in possession is not entitled to the fee, surely one should require to be told where the freehold is. When, therefore, I find an entire absence of anything like base service, or, of the existence of a manor, or of any person holding relation to the lord in whom the freehold could be, I certainly feel myself at liberty to refer the possession of the appellant to a freehold interest, notwithstanding the mode of conveyance is not strictly reconcileable with the common law." Here, there is a manor, and there is a lord to whom suit and service are due, and consequently one in whom the freehold may reasonably be held to be vested. So, Maule, J., says: "The only question for our consideration, is, whether this tenure is other than freehold. If it is, it must be in consequence of its being held of some lord, by base tenure: but there always is in such cases some symbol or badge of the baseness of the tenure, some presentment at the homage that such a conveyance has been made, or admittance, or something to shew a holding at the will of some lord." That precisely describes the sort of tenure in this case. [*Jervis*, C. J. There cannot be a manor without freeholders. *Williams*, J. The free-suitors of the manor are the judges of the court-baron. They must necessarily hold by

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something better than the base tenure you speak of. Crowder, J. Has the *Gloucestershire* case, referred to in Heywood's County Elections, 82, and Elliott on Registration, 6, been over-ruled? The case is thus stated by Heywood :—"There is another class of land-owners, generally known by the name of *customary freeholders*, who seem to be only a superior class of tenants in ancient demesne, for their tenure differs from ancient demesne, as already treated of, only in the mode of conveyance, and has probably been often taken for it. They hold of the lord of the manor, *according to the custom of the manor*; but they do not hold by copy of court-roll, for, their lands pass, not by surrender and admission, but generally by grants, though sometimes by feoffment, lease and release, &c., as any other freeholds usually do. The only badge of superiority in the lord, is, that no alienation can be made without his licence. The following case came before the Gloucestershire committee :—One James Boswood was tenant of lands lying within the manor of Dymock, which is ancient demesne. By the court-rolls of this manor, it appeared that the tenant, if he lived in the manor, always took the oath of fealty, and that the jury always presented the death of a tenant, with the services or heriots due; if those were unknown, they presented him generally; that the Dymock jury was a court-baron, and at Michaelmas a court-leet also; that, when a tenant wanted to alienate, a private court was called, at which two customary tenants and two free-benchers were present; that the free-benchers were freeholders in the parish of Dymock, not holding customary lands, two of whom sat as assessors in every court, but were not vested with any power except as witnesses; that licence was always granted to two customary tenants to enfeof the grantee, to be held of the lord of the manor, according to the customs thereof, and the seller paid a chief-rent, being one year's rent, to the

lord on alienation, and that the licence was inrolled; that the lord of the manor, or his steward, had no other concern in the title; and that the steward sometimes called for the feoffment, to inspect it, but never inrolled it: but it was stated by the counsel for the sitting member, and not denied on the other side, that the deed of feoffment ought also to be inrolled; and that the steward could enforce it, if not done within a year, by calling for the deeds, and holding the estate till they were inrolled. By the custom of the manor, estates descended to lineal heirs only, and, failing such, to the lord of the manor's use. These were the facts of the case, as stated and assumed in argument. After counsel had been heard at great length, the committee resolved, 'that John Boswood, a customary and ancient demesne tenant of the manor of Dymock according to the custom of the manor, had such a freehold therein as entitled him to vote at the last election for the county of Gloucester.'"] That decision proceeded upon the principle, that, where the right was not clearly ascertained, the voter ought to have the benefit of the doubt. In *Stephenson v. Hill*, 3 Burr. 1273, where the lands were described as "customary lands, parcel of the manor of Morland, in the county of Westmoreland, and holden of the lord thereof for the time being," not saying "at the will of the lord,"—it was held, by Lord Mansfield, and Dennison, J., that "it was a settled point that the freehold is in the lord."

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Welsby, for the respondent, was not heard.

JERVIS, C. J. I am clearly of opinion that the revising barrister was right in holding in this case that the claimant had a freehold interest, and that his claim was properly allowed. The case finds that George Pitty is seised *in fee* of a house and land of the annual value of more than 40s., which were conveyed to him by lease

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and release, and that he had been so seised in fee for upwards of twenty years. But, because it further appeared from the court-rolls of the manor of which the land was held, that the claimant acknowledged to hold of the lord "by free deed, fealty, suit of court, and the yearly rent of 4*d.*," and paid a relief to the lord,—although there was no necessity for any licence to alien, or for any inrolment of the conveyance, or any surrender or admittance, to pass the estates,—my Brother Shee says that the case discloses no more than a base tenure in the claimant, which would not confer on him a right of voting, the freehold being in the lord. But this, I apprehend, is a mistake. Where the copyholder holds his estate at the will of the lord, by copy of court-roll, according to the custom of the manor, the freehold remains in the lord. But, here, the *tenant* has the freehold; and the services due are those which follow from the estate, and not from the nature of the tenure. It is one of the first principles of copyhold law that there must be free-suitors,—freeholders of the manor,—otherwise there can be no court-baron, the free-suitors being the judges thereof. Every freeholder of the manor is bound to do suit and service in the court-baron, under pain of distress. Besides the court-baron, which is a civil court of which the free-suitors are the judges, there is in every manor a court-leet held by the lord under a grant from the crown, or by prescription, where in ancient times he exercised a criminal jurisdiction. It is unnecessary, however, very critically to consider the nature of these courts, or the rights of the lord in respect of them. It is enough for the purpose of the present case to say that the finding here shews that there was an estate of freehold in the claimant, and that there is nothing in the facts stated by the revising barrister to cut down the nature of the estate to a lesser interest, and consequently that the claimant was properly held entitled to be registered.

WILLIAMS, J. I am entirely of the same opinion. No doubt there are estates of a peculiar nature known as customary freeholds or tenant-right. These estates are distinguishable from ordinary copyholds, in this, that, whereas the latter are held at the will of the lord, customary freeholds are held, not at the will of the lord, but according to the custom of the manor. Both are held by copy of the rolls of the manor. In all these cases, the question is, whether or not it is an essential part of the title that some part of it should be perfected in the lord's court. If it be so, the freehold is not in the tenant. That is established by the case of *Thompson v. Hardinge*, 1 C. B. 940, and has been, indeed, established law for a very long time, as appears from Burton's Compendium, where, at p. 282, speaking of this kind of estate, the learned author says,—“These, though of the same general nature with copyholds, are commonly denominated ‘customary freeholds:’ but, whatever privileges may be annexed to them, the true freehold interest in the land is always vested in the lord; and, though in some instances a deed of bargain and sale is employed, instead of a surrender, for transferring the customary estate, yet, as the assurance is imperfect without an admittance in the lord's court, the tenure is properly said to be by copy of court-roll.” And, at § 1261, he says: “The great criterion of a customary estate, is, that all alienations of it must be transacted, in part at least, in the lord's court.” The facts stated by the revising barrister in this case shew that the conveyance of the estate in question may be perfect without any intervention whatever on the part of the lord. (a)

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(a) In *Bingham v. Woodgate*, 1 Russ. & M. 32, the Master of the Rolls (Sir John Leach) says: “The custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold. The necessity of surrender and admit-

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CROWDER, J. I am of the same opinion. By the statute 8 H. 6, c. 7, the right of voting for knights of the shire is conferred upon those who have freeholds to the value of 40s. by the year. It has been contended by my Brother Shee that the estate of this claimant could not be freehold, the party being connected with the manor in the way stated in the case. For this he has cited no authority. I am clearly of opinion that the claimant had that which amounted to all intents and purposes to a freehold within the statute of H. 6.

WILLES, J. I am of the same opinion. The contention on the part of my Brother Shee appears to be, that there can be no freehold short of a tenancy in capite. According to a learned note to *The King v. Wilson*, 5 M. & R. 153, it seems, there must be a seigniorship over every freehold. The claimant's vote was properly allowed, and the appeal must be dismissed.

Welsby asked for the costs of the appeal. He submitted that it was the invariable practice of the court to give the respondent costs, where the point was considered so clear as to render it unnecessary to hear him.

Shee, Serjt., contra, suggested that this could hardly be considered a case for costs, seeing that the question involved in it was one of considerable importance, however clear the court might think it after full discussion.

JERVIS, C. J., after consulting the master, said :—The master reports to us that the general rule is as stated by

<p>tance is probably a remnant of the antient tenure of villeinage, and does not affect the freehold nature of the interest, although it prevents the cus-</p>	<p>tomary tenement from being strictly of freehold tenure,—a distinction which is well established."</p>
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Welsby. The appeal, therefore, must be dismissed with costs.

Judgment for the respondent, with costs. (a)

Costs have usually been awarded to the respondent when he has not been called or where the appellant did not appear in support of the appeal,—see *Bage*, App., 7 M. & G. 156, N.R. 983, 1 Lutw. Reg. Cas. 55, *Allen*, App., *House*, 7 M. & G. 157, 8 Scott, 987, 1 Lutw. Reg. Cas. *Bishop*, App., *Smedley*, antè, Vol. II, p. 90, 1 Reg. Cas. 386, *Gale*, *Chubb*, Resp., antè, Vol. 41, 1 Lutw. Reg. Cas. *Kite*, App., *Pring*, Resp., Vol. VIII, p. 13, 2 Lutw. Cas. 141, *Collins*, App., *non Clerk of Tewkesbury*, antè, Vol. XII, p. 639, 1 Reg. Cas. 219, *Moor*, App., *Gilbertson*, Resp., Vol. XIV, p. 70; though in case,—*Walker*, App., 1 Reg., antè, Vol. II, p. 1 Lutw. Reg. Cas. 314,—were refused.

Coucher, App., *Browne*, antè, Vol. II, p. 97, 1 Reg. Cas. 388, and 1 App., *Flatcher*, Resp., Vol. V, p. 14, costs were given, on the ground that the matter was purely one of law. In the return made by the C. J., to the House of Commons upon the subject of appeals, in 1845, that the judge states that the rule upon which the court acted with regard to costs, is, viz. "that, where the

subject matter of the appeal presented a fair and reasonable ground of doubt as to the legal construction of the statute, and the propriety of the determination of the revising barrister, it was not in the intention of the legislature that costs should be awarded against the unsuccessful party."

Since that time, however, the costs of the respondent have invariably followed the event: *Birch*, App., *Edwards*, Resp., antè, Vol. V, p. 45, 2 Lutw. Reg. Cas. 37, *Watson*, App., *Cotton*, Resp., antè, Vol. V, p. 51, 2 Lutw. Reg. Cas. 53, *Onions*, App., *Bowdler*, Resp., antè, Vol. V, p. 65, 2 Lutw. Reg. Cas. 65, *Watson*, App., *Pitt*, Resp., antè, Vol. V, p. 77, 2 Lutw. Reg. Cas. 73, *Copland*, App., *Bartlett*, Resp., antè, Vol. VI, p. 18, 2 Lutw. Reg. Cas. 102, *Mashiter*, App., *The Town Clerk of Lancaster*, Resp., antè, Vol. VI, p. 30, 2 Lutw. Reg. Cas. 112, *Beamish*, App., *The Overseers of Stoke*, Resp., antè, Vol. XI, p. 29, 2 Lutw. Reg. Cas. 189, *Ford*, App., *Smedley*, Resp., antè, Vol. XII, p. 622, 2 Lutw. Reg. Cas. 203, *Beeson*, App., *Burton*, Resp., antè, Vol. XII, p. 647, 2 Lutw. Reg. Cas. 225, *Hamilton*, App., *Bass*, Resp., antè, Vol. XII, p. 631, 2 Lutw. Reg. Cas. 213.

Where the decision of the revising barrister is reversed, no costs are given.

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County of KENT,—Western Division.

HENRY ANELAY, Appellant ; CHARLES EDWARD
LEWIS, Respondent.

Jan. 31.

A purchaser of freehold land (sufficient in other respects to confer a qualification to vote in the election of members), to whom no conveyance has been made, and who has not been let into possession, does not acquire a right to be registered, under the 74th section of the 6 & 7 Vict. c. 18, although he has actually paid the whole purchase-money.

AT a court held for the revision of the lists of voters for the Western division of the county of Kent, on the 22nd of October, 1855, at Lewisham, John Howden duly objected to the name of Henry Anelay being retained on the list of voters for the parish of Lewisham.

The name of Henry Anelay appeared upon the register of voters, as follows :—

Names of Voters.	Place of abode.	Nature of qualification.	Street, lane, or other place where the property is situate, or name of the tenant, &c.
Anelay, Henry.	5, Clark's Terrace, Lewisham Road, New Cross.	Freehold Land.	St. Germain's Road, Forest Hill.

The facts of the case, as proved, were as follows :—

Henry Anelay, in the month of April, 1853, paid 240*l.* in full for the purchase of the freehold land mentioned on the said register. The land had not been conveyed to him by deed : but the said Henry Anelay signed a contract for the purchase thereof, in the words and figures following :—

“ National Freehold Land Society,
“ No. 101.] “ 14 Moorgate Street, London.

“ I, the undersigned, Henry Anelay, of 5, Maze Pond, Southwark, artist, hereby agree to purchase of Messrs. Morland and Wilkinson (hereinafter designated ‘the vendors’) so much of their estate situate at Forest Hill as in the published plan thereof deposited at the office of the said society is distinguished by the numbers 297,

298, 299, 300, 301, 302, 303, 310, 311, 312, 313, and 314 (hereinafter designated 'the premises'), at the price of 240*l.*, and upon the terms stated in the note attached to the said plan, and upon condition that the vendors shall at their own expense execute and give to me a conveyance of the premises, to be prepared and settled for both parties by the solicitor of the vendors ; and that I shall not require the production or any abstract or evidence of the vendors' title, or make any objection thereto ; and that no inaccuracy in the said plan, or in any of the particulars stated thereon, shall vitiate the contract, or entitle either party to any abatement or increase of price, or to any compensation ; and that I shall pay the said price to the vendors within twenty days from the date thereof, with interest thereon from this day at 5 per cent. per annum ; and that, if the whole of such price and interest should not be paid within the time mentioned, the vendors may, at any time afterwards before the actual completion of the purchase (and notwithstanding any part-payment, or possession, or my decease, or anything else, excepting only an express waiver of this stipulation in writing signed by the vendors), absolutely rescind the contract for sale of the premises to me, by giving notice of such rescission ; and that, notwithstanding my decease, or any other circumstance, such notice shall be deemed to have been duly served upon the proper person or persons for effectuating such rescission, by being addressed to me at my residence above mentioned, and put into any post-office ; and that, after such rescission, the vendors may, if they think fit, sell the premises in any manner and upon any conditions which they may approve ; and that, if the ultimate net proceeds of such second sale (after payment of all expenses) shall not amount to a sum equal to the price now agreed to be given by me, with compound interest thereon, at the rate aforesaid, up to

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the time of the vendors' receiving such proceeds, I will, or my executors or administrators shall, forthwith pay to them the amount of the deficiency ; but that, if such net proceeds should exceed the amount of such price and compound interest as aforesaid, such excess shall belong to and be retained by the vendors.

" Dated, this 26th day of April, 1853.

(Signed) " Henry Anelay.

" £240.

" Witness, Arthur Smith.

	By whom entered.	
" Contract Journal.	W. J. P.	Share 12196,7,8,9, 12200,1,2,3.
" Ledger & folio $\frac{40}{388}$	W. J. P.	Order 1954,5,6,7,8,9, 60,1.
" Register of Rights.	E. H.	Date of purchaser's marriage—

" *If the purchaser wishes the conveyance delayed, he must sign the following form ; otherwise it will be made out as soon as practicable after the contract is signed.

" I wish the conveyance to be delayed.

(Signed) " Henry Anelay.

" No. of order to make out the conveyance ———.

" Date of instructions to solicitor ———.

" ** Having ascertained that the proposed purchaser is twenty-one years of age, and, if a woman, that she is unmarried, here insert the purchaser's name, address, and addition, at full length."

It was proved, that, though the land was unlet, it was of sufficient value to confer a vote for the county. The said Henry Anelay had not in fact, either by himself or agent, taken possession of the said land, or exercised any acts of ownership thereon.

The revising barrister decided that the said Henry Anelay was not entitled to have his name retained on the register, and expunged his name accordingly.

If the court should think his decision wrong, the

name of the said Henry Anelay, and also those of thirteen other persons whose rights depended upon his decision in this case, were to be inserted in the register.

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D. D. Keane, for the appellant. The appellant was entitled to have his name on the register. He is a cestui que trust in receipt of the rents and profits of the estate, within the 74th section of the 6 & 7 Vict. c. 18. That section, after reciting, that, by the 2 W. 4, c. 45, it was enacted, "that no person shall be allowed to have any vote in the election of a knight or knights of the shire, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor or cestui que trust in possession shall and may vote for the same, notwithstanding such mortgage or trust," and also reciting that it was thereby also enacted "that no person shall be registered in any year in respect of his estate or interest in any lands or tenements as freeholder, copyholder, customary tenant, or tenant in antient demesne, unless he shall be in actual possession or in receipt of the rents and profits thereof to his own use for six calendar months at least previous to the last day of July in such year," and "that doubts had arisen as to the true intent and meaning of the said first-mentioned enactment in certain cases,"—declares and enacts "that no mortgagee of any lands or tenements shall have any vote in the election of a knight or knights of the shire, or in the election of a member or members to serve in any future parliament for any city or borough in which freeholders now have a right to vote, for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof, but that the mortgagor in actual possession or in receipt of the rents and profits thereof, shall and may vote for the same,

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notwithstanding such mortgage; and that no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but *that the cestui que trust in actual possession or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee*, shall and may vote for the same, notwithstanding such trust." The case shews a good contract here for the purchase of the land by the appellant, and that the whole purchase money had been paid. Under these circumstances, according to the ordinary rule in equity, the vendors would become trustees for the purchaser: and the fact of the conveyance not having been actually executed by the vendors makes no difference, the contract contemplating that its execution should be deferred. [Crowder, J. The 74th section speaks of a cestui que trust who is "in actual possession, or in the receipt of the rents and profits."] It is not necessary, it is submitted, that he should absolutely have received the rents and profits through the trustees; it is enough that he had a right in equity to compel them to pay them over to him. And, according to the case of *Astbury*, App., *Henderson*, Resp., antè, Vol. XV, p. 251, the criterion of value under the statute 8 H. 6, c. 7, is not what the land actually produces, but what in its existing state it reasonably may produce. In that case, Jervis, C. J., says: "It is enough on the present occasion to say, that there is abundant evidence in the case before us, to shew that the plot of land in question is *worth* more than 40*s.* a year, and that it is only through the indolence or the obstinacy of the appellant that he has failed to realise that amount. He gives 150*l.* for it,—an amount which would produce upon any ordinary investment considerably more than 40*s.* a year. The case finds that he *can* let it for 15*l.* a year, but will not: and the revising barrister held that the land did not confer a vote, simply because, if let for

agricultural purposes, or for any other than building purposes, it would not realise a rent of 40*s*. That, I think, is not the true question: the true question is, what is the land reasonably worth,—what would it fetch in the market? That question is in effect decided by the revising-barrister, when he says that the land, if used for the purpose for which it was originally destined when it came into the appellant's hands, viz. to let for building, is worth at least 15*l*. per annum." If, therefore, the appellant had himself been in possession, according to that case, the value clearly would be enough to entitle him to be on the register.

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Macnamara, for the respondent. The revising barrister was clearly right in holding that the appellant had not such an estate as to entitle him to be on the register. The appellant, it appeared, had contracted for the purchase of the land in question, and had paid the purchase money: but no conveyance had been executed by the vendors, nor was there any time stipulated for its execution; neither was the purchaser let into possession; nor was there anything said in the contract as to the giving of possession: and the land is unlet. The case on the part of the appellant is rested on the 74th section of the 6 & 7 Vict. c. 18. But by that section the right of voting is expressly given to "the cestui que trust *in actual possession*, or in the receipt of the rents and profits thereof, though he may *receive* the same through the hands of the trustee." The same words are found in the 23rd and 26th sections of the 2 W. 4, c. 45, upon which there have been two decisions. [*Williams*, J. Similar words are to be found in the 18 G. 2, c. 18, s. 5. *Jervis*, C. J. And the precise words in the 7 & 8 W. 3, c. 25, s. 7.] The 23rd section of the 2 W. 4, c. 45, for which the latter words of the 74th section of the 6 & 7 Vict. c. 18 are substituted, enacted "that no person

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shall be allowed to have any vote in the election of a knight or knights of the shire for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor or cestui que trust *in possession* shall and may vote for the same estate, notwithstanding such mortgage or trust."

To entitle the cestui que trust or mortgagor to vote, he must still be in actual possession or in actual receipt of the rents and profits. In *Murray, App., Thornile, Resp.*, ante, Vol. II, p. 217, 1 Lutw. Reg. Cas. 496, it was held that the words "actual possession," in the 2 W. 4, c. 45, s. 26, mean a possession *in fact*. Tinda, C. J., in delivering judgment, said,— "The question undoubtedly turns upon the meaning of the words 'actual possession:' and we think those words mean a possession in fact, as contradistinguished from a possession in law; and that, as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed. There is a long course of authorities fully establishing the distinction between a possession or seisin in fact of a rent-charge, and a possession or seisin in law." And, after referring to Littleton, § 235; Co. Litt. 15. b., 160. a.; and Comyns's Digest, *Seisin* (C.) and (D.),—his Lordship says: "The *actual possession* of rent being, therefore, a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer. And, as it is quite clear, that,

in the case of land, there must be more than the execution of the conveyance,—that there must be actual possession or receipt of the rents and profits,—there seems no reason why, in the case of an incorporeal hereditament, to which the provision of the statute equally applies, there should not be such further actual possession as the nature of the subject itself is capable of.” And that was acted upon in the subsequent case of *Haydon, App., The Overseers of Tiverton, Resp.*, antè, Vol. IV, p. 1, 1 Lutw. Reg. Cas. 510, where it was held that the *assignee* of a rent-charge is not entitled to be registered unless he has been in the *actual* receipt of it for six months before the last day of July. In Elliott on Registration, 2nd edit. p. 139, it is said, that, “if the voter be out of possession, and another person receive the rents and profits, claiming right thereto, or if, after a sale, *the vendor continue in possession*, or receive the rents on his own account,—in these cases, it is conceived, the person having a bare right to the rent cannot vote.” [*Jervis, C. J.* I suppose we must assume, though the revising barrister does not in terms so state, that the vendors are in possession. The argument on the part of the appellant is, that the vendors are trustees for him, and that what they receive or may receive he is in the receipt of through their hands.] That is expressly against the words of the statute. Besides, there is nothing in the case to shew that the vendors are receiving the rents and profits as trustees for the vendee, so as to enable the court to say that the receipt by them is a receipt by him. All that the contract gives the vendee, is, a right to file a bill for a specific performance. The execution of the conveyance was delayed at the vendee’s own request: he therefore clearly would not be entitled to the profits, if any there were. [*Jervis, C. J.* I find it laid down in Heywood’s County Elections, 111, that the question in these cases

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is, "who is to have the rents and profits of the estate by virtue of the agreement until the legal conveyance is made? for, if they belong to the vendee under such circumstances as that he can compel a specific performance, the vendor is trustee of the legal estate for him; but, on the contrary, if they belong to the vendor, though the vendee is in possession of the premises, he clearly is not entitled to vote, by the 7 & 8 W. 3, c. 25. In many cases, whether the vendee shall be trustee or cestui que trust, may depend upon whether it is through the default of either of the parties that the legal estate has not been conveyed." The agreement here does not clearly confer so equitable an interest upon the vendee as to entitle him to call upon the vendors to pay over the profits to him. Lapse of time, or other circumstances, might prevent the interference of a court of equity. The cases upon the subject of contracts for the sale and conveyance of land are all collected in Elliott on Registration, 2nd edit. pp. 56 et seq.; and the result is thus summed up at pp. 60, 61,— "The interest of a purchaser under a contract, therefore, is rather an equity or equitable right, than an equitable estate; and, though for some purposes equities or equitable rights are analogous to legal rights, they differ from the latter, in being assignable for valuable consideration, and devisable, which makes them at first appear to be identical with equitable estates: whereas, equities or equitable rights, if not asserted within a reasonable time, are lost: see Mathews on Presumptions, 415 et seq., and *Gill v. Fleming*, 1 Ridgw. P. C. 420— or, in other words, are virtually barred by lapse of time— though courts of equity, in cases of contracts for sales, would treat the purchaser's claim as a stale demand in a much shorter period than would be a bar to an analogous legal right. It may also be observed, that, if the purchaser be let into possession before completion of the

contract, though this may so far vary the case that his equitable right would be preserved from being barred by lapse of time, yet it can hardly be considered to convert his right into an estate pending the contingency of the title being made good and the money being paid; for, should the contract be eventually rescinded, or found to be such as the court would not enforce, the purchaser would have to account for the rents and profits received by him: *King v. King*, 1 Mylne & K. 442, and it is inconsistent with the nature of an equitable estate, that the person entitled to it should in any event be liable to account to another for all the rents and profits which he may happen to receive. Upon the whole, there appears to be much reason to hold, that, so long as the purchaser is liable to be barred by lapse of time, or to have in any event to account for what he receives, or has not an unqualified right to require the legal estate to be conveyed to him, he has not an equitable estate, nor can with propriety be said to be *seised in equity* of the land contracted to be purchased." [Williams, J. Are any instances given as to the effect of lapse of time?] Several authorities are referred to, to shew that the relation of trustee and cestui que trust does not exist under circumstances like the present,—amongst others, *Wall v. Bright*, 1 Jac. & W. 494, *Mackrel v. Hunt*, 2 Madd. 34, n., and *Tasker v. Small*, 3 Mylne & Cr. 70, 71: and at p. 60, the author says, that, "where no time is fixed for completion of the contract, as the vendor is not entitled to any interest, so the purchaser is not entitled to the rents or profits till the purchase is completed." [Williams, J. If the claimant here had died, so far as we can see, would not the land have gone to the heir?] The right to compel the vendors to convey probably would. [Jervis, C. J. There is a qualification arising out of this piece of land. Who has it? The statute expressly says that the trustees shall

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not have it. The statute assumes that every piece of land in trust is either in the possession of the cestui que trust, or he is in the receipt of the rents and profits. In *Astbury*, App., *Henderson*, Resp., antè, Vol. XV, p. 251, this court held that what the land actually produces is not the criterion of value: therefore, though the land is at the moment unproductive, it still has a qualification. The trustees cannot vote for it.] The vendors are not, it is submitted, so clearly trustees. In *Astbury*, App., *Henderson*, Resp., the decision turned exclusively on the question of value, not on the possession of the land.

Keane, in reply. The case last cited is not distinguishable from the present. Nothing remained to be done here, but the execution of the conveyance, which the vendors had no right to refuse.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

This was an appeal from the decision of a revising barrister, which was argued during the last term, before my Brothers Williams, Crowder, and Willes, and myself. The court took time to consider; and I have now to deliver our judgment.

The question in this case, is, whether the purchaser for full value, by a binding contract, but without any conveyance of the legal estate, of freehold land, not actually producing any rents or profits, but being sufficient in value and other respects to confer a vote in the election of members for the county,—the seller, having been allowed to remain in actual possession,—is entitled to vote in respect of the land so purchased.

This question turns altogether upon the construction

of the statutes; no franchise having existed in respect of such an ownership, at the common law.

By the 8th of H. 6, c. 7, the right which by the common law existed in every freeholder in the country, was restricted to those who "shall have free land or tenement to the value of 40s. by the year at the least above all charges;" and such candidates as should have "the greatest number of them that may expend 40s. by the year, and above," were to be returned as members: and it was provided that he which cannot expend 40s. by the year as afore is said shall in no wise be chooser of the knights for the parliament." Under this statute, it is not necessary that the land, in order to confer a vote, should actually produce the annual amount or value of 40s. It is sufficient if the owner can, if he thinks proper, realise the 40s. a year out of the land, although, by reason of indolence or caprice, he lets it be idle. It is clear, however, that the statute of H. 6 applied only to legal estates; that, consequently, a person who had only the beneficial interest could not vote in respect of it under that statute; and that, under it, in a case like the present, the franchise would belong to the seller.

This separation of the right of voting from the beneficial interest in the land, was to some extent corrected by the 7 & 8 W. 3, c. 25, s. 7, which enacted that "no person or persons shall be allowed to have any vote in the election of members to serve in parliament for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor or cestui que trust *in possession* shall and may vote for the same estate, notwithstanding such mortgage or trust:" and then follows a provision against multiplying votes by splitting or dividing the qualifying property; which provision, inasmuch as it is levelled against colourable and fraudulent transactions only, and

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no fraud or bad faith is imputed to the present claimant, need not be further noticed.

The statute of W. 3 having thus taken away the franchise from the trustee only in cases where he was not in actual possession, or in receipt of the rents and profits, it follows, that, whilst that statute only was in force, the seller, not having parted with the legal estate, and remaining in actual possession or receipt of the rents and profits, would have still had the right to vote, to the exclusion of a buyer in the position of the claimant. It should seem that the intention of that statute was, simply to transfer the franchise from the owner of the legal estate to the person beneficially entitled, in all cases in which the former, by reason of his not being in actual possession or receipt of the rents and profits, fell within the prohibitory words, and so as to give the cestui que trust the right to vote, if *he* were in possession. We find nothing in the language of that statute to shew that the legislature intended, in any case where either the trustee or the cestui que trust was in possession, to take away the franchise from both. The intention appears to have been, that the right to vote should be determined by the possession; but that, whichever might happen to be in possession, there should be, as before, a vote in respect of the property.

The 23rd section of the Reform Act, 2 W. 4, c. 45, is almost in the same words as the statute of W. 3,—“that no person shall be allowed to have any vote in the election of a knight or knights of the shire, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor or cestui que trust *in possession* shall and may vote for the same estate, notwithstanding such mortgage or trust.”

The 26th section of the same statute enacts, *inter alia*, that “no person shall be registered in any year in

respect of his estate or interest in any lands, &c., unless he shall be *in actual possession*, or *in receipt of the rents and profits thereof to his own use*, for six calendar months at least previous to the last day of July in such year."

To the former of these sections of the Reform Act, if uncontrolled by the latter, the same remarks would apply which had been already made upon the similar language of the statute of W. 3. Looking at the words of the 23rd section alone, it would have seemed, that, if either the trustee or the cestui que trust were in possession or receipt of the rents and profits, there was a vote in respect of the land. Such a construction, however, of the 23rd section appears to conflict with the words of the 26th section, "*to his own use*;" and, reading the 23rd and 26th sections together, their conjoint effect appears to be, that, although a trustee in actual possession might be registered, and vote, yet that, if the actual possession were in a tenant, and the trustee were in receipt of the rents and profits only, he could not vote because he could not be registered under the 26th section, inasmuch as he had not been in the receipt of the rents and profits "*for his own use*." There then arose a case under that statute, in which it might have been contended that the land was, so to speak, disfranchised, although the trustee was in receipt of the rents and profits.

It may be said, that, even if such were the effect of the 26th section, it did not expound the deliberate intention of the legislature, because of its flowing from one of the general provisions of the statute, and not in any respect from the section in which the subject of trust estates is specifically mentioned and dealt with. To this, however, it may be answered, that the 23rd section was taken almost verbatim from the statute of W. 3, and that the language of that statute upon the matter of detail may have been retained, without full

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consideration how far it was consistent with the general intent of the statute distinctly expressed in the 26th section. Possibly, considering that the 23rd section dealt with two different subject-matters,—mortgages and trusts,—the proper construction of the two sections, 23 and 26, taken together, might have been, *reddendo singula singulis*, that mortgagees and trustees who answered the description in the 23rd section, should still be able to vote, provided they also fulfilled the conditions of the 26th section; so that mortgagees might vote in respect either of actual possession or receipt of the rents and profits, such receipt being applicable to the discharge of their debt, and so “to their own use;” and that trustees might vote, if actually in possession, which they might be, but not in respect of the receipt of the rents and profits, which they could not be said to receive “to their own use,” so as to enable them to be registered under the 26th section of the statute; that section making registration essential to the right to vote “*notwithstanding anything in the statute before contained.*” But, however this may have been, it seems certain, that, in order to entitle a cestui que trust to vote under the Reform Act, it was necessary that he should be in possession or in receipt of the rents and profits, and that, whatever might have been the effect of that statute in the case of a cestui que trust receiving the rents and profits by the hands of his trustee, the mere possession of the trustee could not be considered as the possession of the cestui que trust (from which, indeed, it is expressly contradistinguished in the 23rd section), so as to give the cestui que trust a right to vote in respect of such possession. From the time, therefore, of the passing of the Reform Act, until the 6 & 7 Vict. c. 18, the claimant would not have been so entitled.

It only remains to consider the effect of the 74th section of the 6 & 7 Vict. c. 18, which, after reciting

the 23rd section of the Reform Act, and so much of the 26th section as relates to the present subject, and further reciting that doubts had arisen as to the true intent and meaning of the 23rd section, *declares* and enacts, that "no mortgagee of any lands, &c., shall have any vote * * for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that the mortgagor in actual possession or receipt of the rents and profits hereof, shall and may vote for the same, notwithstanding such mortgage; and that no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the cestui que trust *in actual possession, or in receipt of the rents or profits thereof, though he may receive the same through the hands of the trustee*, shall and may vote for the same, notwithstanding such trust." In this section, the distinction between the case of the mortgagee and trustee already suggested as reconciling the two sections of the Reform Act, is declared to have been intended by the legislature. The section, however, goes further; for, it takes away the right of a trustee in actual possession to vote; and in this respect it may perhaps be considered as a new enactment. The contention on behalf of the appellant must be, that the right so taken away from the trustee is conferred upon the cestui que trust. If this be so, it must be by force of the following words, "but that the cestui que trust *in actual possession, or in receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee*;" and, in order to give those words such an effect, the phrase "though he may receive the same *through the hands of the trustee*," must be read as referring not only to the receipt of the rents and profits to which alone according to the ordinary and usual meaning of the words, whether grammatical or

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popular, they would apply, but also as reflecting a light upon the words "in actual possession," so as to make the actual possession of the trustee constructively the possession of the cestui que trust, for the purpose of conferring the protection upon the latter.

Upon full consideration, we feel bound to reject this construction of the statute. It is not in accordance with the ordinary meaning of the words used, either in the 26th section of the Reform Act, or in the 74th section of the 6 & 7 Vict. c. 18: and there is nothing in the former statute, as already explained, and nothing except the words themselves under consideration, and upon which the question arises, in the latter statute, to shew an intention on the part of the legislature that the cestui que trust should, in respect of the possession of his trustee, have such a right. There is nothing in the history of the franchise to lead us to the conclusion that the legislature meant more than they have expressed by the language employed, taken in its ordinary sense: nor can we find any absurdity or inconsistency with the statute of 6 & 7 Vict. c. 18 itself, or the enactments *in pari materia* with it, in the sense so expressed. On the contrary, it seems to us to be more consistent with the previous enactments upon this subject, that the cestui que trust should not have the franchise, except in respect of the actual enjoyment of the property; and this he has, if he receives the rents and profits, though by the hands of his trustee; whereas, if the trustee be in possession, and the cestui que trust receive no rents and profits, he has no enjoyment at all. Moreover, the construction contended for by the appellant, in order to give effect to a supposed intention of the legislature, would render nugatory express words of the statute; for, if the actual possession of the trustee is to be converted by construction into the actual possession of the cestui que trust, the word "actual," as applied to such

possession, is rendered unmeaning and in effect struck out. The bare equitable right of the cestui que trust to the possession, without the possession in fact,—in other words, “actual possession,”—or receipt of the rents and profits either by himself or his trustee, was a right in respect of which before, or without, the statute 6 & 7 Vict. c. 18, the cestui que trust could not vote; and, if it be not in furtherance of the object of the 26th section of the Reform Act, it is at least quite in accordance with that section, that such a distinction should exist between a person who has the right only to possession, but who has not the possession in fact, or actual possession.

This view is fortified by the decisions of the court,—*Murray*, App., *Thorniley*, Resp., antè, Vol. II, p. 217, 1 Lutw. Reg. Cas. 496, and *Haydon*, App., *The Overseers of Tiverton*, Resp., antè Vol. IV, p. 1, 1 Lutw. Reg. Cas. 510,—as to what is an actual possession within the 26th section of the Reform Act.

Supposing that, instead of a mere contract of sale, there had been an actual conveyance of the freehold from the sellers to the purchaser, and the sellers had yet remained in possession, could it have been contended that the purchaser was entitled to be registered, and to vote? This question is answered in the negative by Lindal, C. J., in the considered judgment of this court in *Murray*, App., *Thorniley*, Resp., where it is laid down that “actual possession” means possession in fact, as contradistinguished from a *possession in law*, and it is stated to be “quite clear, that, in the case of land, there must be more than the execution of the conveyance,—that there must be actual possession, or receipt of the rents and profits. And it could not have been the intention of the legislature to put a purchaser who has not obtained a conveyance, in a better condition than one who has,—in fact, to give to a person who has a mere equity, a right of voting which the same person

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would not have had if he had acquired a complete title both at law and in equity; and would not have had, for this reason, because he could not have stood the test of the 26th section of the Reform Act, which introduced one of the leading characteristics of the present system,—registration,—and made that in every case, whatever might be the qualification, essential to the exercise of the right.

For these reasons, we are of opinion that the claim to vote in this case was properly disallowed, and that the decision of the revising barrister ought to be affirmed.

Decision affirmed.

Borough of CARDIGAN.

JOB MORGAN, Appellant, JOHN PARRY, Town-Clerk of
ABERYSTWTH, Respondent.

Jan. 29, 1856.

The 13th section of the 6 & 7 Vict. c. 18, which requires the lists of voters prepared by the overseers to be signed by them, is in this respect directory only.

AT a court held for the revision of the lists of voters for the borough of Cardigan and its contributory boroughs, on the 11th of October, 1855, at Aberystwith, one of the said contributory boroughs, a preliminary objection was duly taken to the list of voters in respect of occupation within the town and liberty of Aberystwith, as not being signed by a majority of the overseers thereof.

The said town and liberty is a district within the said borough of Aberystwith, maintaining its own poor, and having two overseers, two churchwardens, and an assistant-overseer, all duly appointed and executing the usual duties of their respective offices, with this exception,—that the assistant-overseer, according to directions given him on his appointment, is occupied only in the business of collecting the rates, and with no other duties of an overseer.

The list in question was signed by the two overseers

of this district only : and the revising barrister held it on that account invalid, and further, that, under the 3 & 7 Vict. c. 18, s. 27, he must take the register in force for the current year to be the list of voters for that district for the ensuing year ; and he accordingly proceeded to revise the same, by inserting in it the names of claimants who proved their notices of claim, and by expunging the names of those to whom objections had been duly made, and who failed to prove their right.

The revising-barrister also revised the new list, in the usual manner, in order that the same might be established instead of the last year's register, if the court should hold the former valid under the circumstances above mentioned.

The questions for the opinion of the court, were,— Questions.
first, whether the list of voters so signed as aforesaid for this year, is valid or not,—secondly, whether the last year's register is to be taken unrevised as the register for the ensuing year ; or whether such register, revised, is to be taken as the register for the next year.

If the court should be of opinion that such first-mentioned list was valid, and that the revising-barrister ought to have revised the same, then the schedule annexed to the case, and marked A., being such revised list, was to be the register of voters for the ensuing year, in place of the old register revised by the revising-barrister as aforesaid, and which he had returned to the town-clerk of the said borough : But, if the court should be of opinion that the said first-mentioned list was invalid, and further that the register in force during the last year ought to be taken without alteration as the register for the ensuing year, then the schedule thereto, marked B., being such last year's register, was to be the register for the ensuing year, in place of the said revised register as returned by him.

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Bailey, for the appellant. (a) The question in this case turns mainly upon the construction of the 13th and part of the 101st section of the 6 & 7 Vict. c. 18. The former enacts "that the *overseers* of every parish or township shall, on or before the last day of July in every year, make out, or cause to be made out, according to the form numbered 3 in the schedule B. to this act annexed, an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than 10*l.*, situate wholly or in part within such parish or township, &c. &c., and the *said overseers* shall sign such lists," &c. And the 101st section enacts, that, throughout the act, in the construction thereof, except there be something in the subject or context inconsistent with or repugnant to such construction, "the words 'parish or township' shall extend to and mean every parish, township, village, hamlet, district, or place maintaining its own poor, and the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever

(a) The points marked for argument were as follows:—

"1. That the list of voters was properly prepared and signed by the two overseers alone, as neither the churchwardens nor the assistant-overseer had any right, power, or authority to join in preparing or signing the same:

"2. That the revising barrister ought not to have revised the register in force for the

current year, which purports to be signed by two 'overseers of the chapelry of Aberystwith,' such signature not being in accordance with the provisions of 6 & 7 Vict. c. 18, s. 13:

"3. That such register being in its origin invalid, continued after its revision by the barrister, and still is, invalid."

The respondent did not appear.

manner they may be appointed, and that all matters by this act directed to be done by the overseers of a parish or township may be lawfully done by the major part of such overseers." The appointment of overseers of *parishes* is provided for by the 43 Eliz. c. 2, s. 1; and that of overseers of *townships* and villages by the 13 & 14 Car. 2, c. 12, s. 21, which, reciting that the inhabitants of certain counties, by reason of the largeness of the *parishes* within the same, have not nor cannot reap the benefit of the 43 Eliz. c. 2, s. 1, enacts that "there shall be yearly chosen and appointed, according to the rules and directions in the said act mentioned, two or more overseers of the poor within every of the said townships or villages, who shall from time to time do, perform, and execute all and every the acts, powers, and authorities for the necessary relief of the poor within the said township or village, and shall lose, forfeit, and suffer all such pains and penalties for non-performance thereof, as is limited, mentioned, and appointed in and by the said in part recited act." If this were the case of a *parish*, it could not, against the current of authorities, be sperately contended that churchwardens are not overseers of the poor: but, in the case of *townships* and *villes*, it is otherwise. See Com. Dig. *Parliament* (R. 9.), as to the effect of a subsequent statute in repealing a former one. It is clear from the description of it in this case, that Aberystwith is a township within the 13 & 14 Car. 2, c. 12. In the list referred to it is called a "chapelry;" and, in the register for the past year, the two persons who make it out call themselves "overseers of the chapelry." If a chapelry, it cannot be a parish. [*Jervis*, C. J. Does that follow?] Non constat that the statute of Charles does not apply, though this be not strictly a township.

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JERVIS, C. J. I think, and my learned Brothers agree with me, that we cannot conveniently dispose of

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this case without being informed whether this place is a parish or a township. The case must, therefore, go back to the revising-barrister to be re-stated in that particular.

The case having been accordingly sent back to the revising-barrister, he returned it, with the following additional statement:—

Additional
statement.

“This case having been remitted to me by the court of Common Pleas, to be more fully stated, I am only able to add that the ‘town and liberty of Aberystwith’ is a chapelry within the parish of Llanbadarn-fawr, and that *it has its own church*; but, when separated from the mother parish, there was no evidence before me.

“No point was made before me that the churchwardens in question were not overseers within the 6 & 7 Vict. c. 18; the only contention in favour of the list, being, that the said act was directory only, and that the want of signature by a majority of the overseers did not invalidate it.

“I decided that the signature of such a majority was necessary; but, having found that there was scarcely a parish in the county of Cardigan whose list was signed, I granted an appeal on that point, being the only question raised before me.”

Bailey now resumed his argument. The amended case does not throw much additional light upon the subject. It is submitted that the list described in the case as being marked A., has been properly signed. [*Cresswell, J.* Do you contend that “churchwardens” are not “overseers” within the 13th section of the 6 & 7 Vict. c. 18?] For the purposes of this case. [*Williams, J.* Supposing you are wrong as to that, do you concede that the new list is a bad one? Do you give up the argument that the words of the 13th section are directory

Jervis, C. J. Is the whole parish or township to be franchised because one man has possibly neglected it? It is submitted that the list is good, either because it need not be signed at all, or because it is entirely signed. Upon the statement of the case, it appears that there was no evidence before the revising committee that this district was a township at the time of passing of the 43 Eliz. c. 2. It must, therefore, be decided that it is a township within the 13 & 14 Car. 2, s. 21. [*Cresswell, J.* The revising barrister has found the fact which we wished to ascertain. He says that the "town and liberty of Aberystwith" is a township within the parish of Llanbadarn-fawr, and that it has its own church; but, when separated from the parish, there was no evidence before him. The question presented to and decided by him seems to have been as to whether the 13th section of the 6 & 7 Will. 4, s. 18, was directory or compulsory. All the rest seems to have been conceded. *Jervis, C. J.* It appears from Camden (*a*), that, in 1607, Aberystwith was the most populous town of the whole county of Cardigan: probably, therefore, is, that it would take the

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See Camden's Britannia, p. 155,—“From the mouth of the Tivy, the shore is gently intersected by small rivulets, among which, in the upper part of the county, the principal is that called by Ptolemy Stuccia, the name of which still remains entire in common use, Y-stwith. It is the source of lead-mines, and its mouth Aber-y-stwith, the most populous town of the county, which Gilbert de Clare fortified with walls, and held a long time against the

Welsh. Contiguous to this is Lhan B'adern Vawr, q. d. the church of great Paternus, who was a native of Bretagne, as the writer of his life expresses it, ‘and by feeding governed, and by governing fed the church of Ceretia.’ To his memory in after ages was founded a church and an episcopal see here. But the bishopric, as Roger Hoveden writes, ‘early declined, because the parishioners slew their pastor.’”

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benefit of the statute of Charles when it passed.] If the new list is held bad for want of the signatures of the churchwardens, the register of the last year is open to the same objection. [*Jervis*, C. J. As the case at present stands, I think the appeal should be dismissed. The point which you seek to make (and on which I think you must fail), is, that the churchwardens are not overseers within the statute of Elizabeth, because there was no evidence that Aberystwith was a parish at the time of the passing of that act. That point, I think, is not now open to you; because, if it had been urged at the time of the revision, the fact might have been capable of proof. Your case is, that, assuming that the churchwardens are overseers, the 13th section of the registration act is not compulsory. As you do not discuss that point, I express no opinion upon it,—though I must confess I feel grave doubts as to its being more than directory. That being so, then comes the question whether the register of the preceding year is assailable on the same ground. I think not, because the 27th section provides, that, “in case no list of voters shall have been made out for any parish, township, or place, in any year,—or in case such list shall not have been affixed in any place hereinbefore mentioned in that behalf,—the register of voters for that parish, township, or place then in force shall be taken to be the list of voters for that parish, township, or place, for the year then next ensuing,” subject to revision in respect of new claims or objections. *Cresswell*, J. The question whether the 13th section is compulsory or directory only, is presented to us upon the face of the case. The matter must have been discussed before the revising barrister. As at present advised, I can give no judgment upon it. *Jervis*, C. J. The better course will be to adjourn the discussion, to enable Mr. Bailey to look into the authorities upon this point.]

Bailey, on a subsequent day, resumed his argument. The difficulty arises from the interpretation clause, s. 101, which extends the signification of the word "overseers" beyond its natural meaning. That section enacts that "throughout this act, in the construction thereof, except there be something in the subject or context inconsistent with or repugnant to such construction," "the words 'overseers' or 'overseers of the poor' shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed, and that all matters by this act *directed* to be done by the overseers of a parish or township, may be lawfully done by the major part of such overseers." [*Cresswell*, J. If all the clauses relating to acts to be done by overseers are directory only, it was quite unnecessary to provide that they might lawfully be done "by the major part of the overseers;" for, if they need not be done at all, à fortiori it could be no objection that they are done by the majority only.] There are no authorities precisely bearing upon the section in question; but there are several that are somewhat analogous. In *The Queen v. The Mayor of Dover*, 11 Q. B. 260, the court of Queen's Bench declined, upon a return to a mandamus, to decide whether or not it was necessary for the churchwardens to sign the burgess-list, under the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, s. 15. But, in a subsequent case of *Clarke v. Gant*, 8 Exch. 252, the Exchequer Chamber held that all the overseers, whether churchwardens or not, must sign the list. Maule, J., by whom the judgment was given, said,—“The statute requires, —for reasons which, though not specified, may be conjectured,—that all the overseers, whether churchwardens or not, should sign the lists; and we are bound by the plain language of the act.” [*Williams*, J. That

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was an action for a penalty against the defendant for neglecting to concur in the making out of the list: I must confess I do not see that it governs this case at all.] In *Gouldworth v. Knights*, 11 M. & W. 387, it was held to be competent for any one of the churchwardens or overseers to authorise a distress for rent in arrear for premises vested in them by the 59 G. 3, c. 12, s. 17. [*Jervis*, C. J. A distress for rent may be authorised by any one of several joint-tenants. By the Reform Act, 2 W. 4, c. 45, ss. 37 et seq., the overseers are directed to prepare lists, but there is no provision for their signature. *Cresswell*, J. How can the list be said to be authenticated to the public as the list, unless it is signed by the overseers? *Jervis*, C. J. Do you admit that the list must be signed by *one* of the overseers?] It is not necessary to admit that. The 76th section of the Reform Act imposed a penalty upon overseers for wilfully inserting in the list of voters the names of persons not entitled to vote: and in *Tarr v. M'Gahey*, 7 C. & P. 383, it was held, that, to render a party liable to this penalty, it was not necessary that he should be shewn to have acted from any corrupt motive. Under s. 51 of the 6 & 7 Vict. c. 18, the revising barrister is empowered to fine the overseers for wilfully refusing or neglecting to deliver the lists to be made out by them; and by s. 97, a penalty of 100*l.* is imposed upon the overseer (and also upon various other persons charged with the performance of duties under the act) for any "wilful misfeasance, or wilful act of commission or omission contrary to the act." [*Jervis*, C. J. The act contemplates a punishment for the public wrong, and a particular private remedy to the party damnified. *Cresswell*, J. The penalty imposed on the overseers by s. 51, is, for omitting to deliver, not for omitting to sign the list. It is the duty of all the overseers (including churchwardens) to sign the list. It may be, that, though the signature

of the majority will make a perfect list, the revising barrister may still fine one who wilfully refuses to deliver, notwithstanding the list was a good one.] Many reasons may be suggested why the 13th section should be held to be directory only, as regards the signature of the lists. The clause contains no negative or prohibitory words. The distinction between words in a statute that are directory and those which are imperative, has been recognised in a variety of cases. The statute 5 Eliz. c. 4 requires the binding of an apprentice to be for seven years, and s. 41 avoids all indentures made otherwise than according to that law; yet indentures for a less time were held voidable only as between the parties: *lex v. St. Nicholas, Ipswich*, 1 Burr. S. C. 91, 2 Stra. 666, Cas. Temp. Hard. 323. So, the statute 43 Eliz. c. 2, s. 5, enacted that male apprentices should be bound out by the parish till the age of twenty-four; yet a binding till twenty-one was held to confer a settlement, the statute being directory only in this respect, not compulsory: *Rex v. Woolstanton*, 1 Bott, 610. (a) The rule is well expressed by Taunton, J., in *Pearse v. Morrice*, 3 Ad. & E. 84, 96,—“The distinction between directory and imperative statutes has been long known: an early instance in which it was taken, is the case in *Strange*,—*Rex v. Sparrow*, 2 Stra. 1123,—as to the time of choosing overseers. I understand the distinction to be, that a clause is directory where the provisions contain mere matter of direction, and nothing more; but not so where they are followed by such words as are used here, viz. that anything done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition, which cannot be dispensed with by the construction here contended for. In *lex v. Gravesend*, 3 B. & Ad. 240, the ground upon

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(a) But see *The King v. The Inhabitants of Gravesend*, 3 B. & Ad. 240.

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which Lord Tenterden distinguished that case from *Res v. St. Nicholas in Ipswich*, was, that, in the latter case, the words of the section relied upon were not negative or prohibitory, but permissive, whereas, in *Res v. Gravesend*, the statute (10 G. 2, c. 31, s. 5) contained a direct prohibition." In the 6 & 7 W. 4, c. 96, s. 2, which requires the churchwardens and overseers to *sign* the declaration given at the foot of the schedule, on making a rate, there are negative words—"otherwise the said rate shall be of no force or validity :—" see *The Queen v. The Inhabitants of Fordham*, 11 Ad. & E. 78, 3 P. & D. 95. In *The King v. The Justices of Leicester*, 7 B. & C. 6, 9 D. & R. 772, it was held that the 54 G. 3, c. 84, which enacted that the Michaelmas quarter sessions shall be holden in the week next after the 12th of October, was merely directory, and that those sessions might, notwithstanding that enactment, be legally holden at another time. "It has been asked," said Lord Tenterden, "what language will make a statute imperative, if the 54 G. 3, c. 84, be not so. *Negative words would have given it that effect*; but those used are in the affirmative only." So, in *The King v. The Inhabitants of Birmingham*, 8 B. & C. 29, 2 M. & R. 280, where a marriage was solemnized by licence between a man and a woman, the former being a minor, whose father was living, and did not consent to the marriage, it was held that the marriage nevertheless was valid, the 4 G. 4, c. 75, s. 16, which required such consent, being directory only. Lord Tenterden said,—"*The language of the (16th) section is merely to require consent; it does not proceed to make the marriage void, if solemnized without consent. Then, the 22nd section declares that certain marriages shall be null and void, and a marriage by licence without consent is not specified. Thus far, therefore, the question depends upon the direction in the 16th section: and, if there were any doubt upon the*

retraction of that section, it would be removed by the which enacts, that, 'if any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under age, by means of false swearing in any matter to which the party is required personally to swear,'—not that the marriage shall be void, but that the property accruing from the marriage shall be forfeited, and shall be secured for the benefit of the innocent party, or the issue of the marriage. This is a penalty for disobeying the direction of the legislature in the 16th section, and is calculated to prevent fraudulent and clandestine marriages, by depriving the party of the pecuniary benefit, which is most commonly the inducement moving to the fraud." In *Rea v. Sneyd*, 9 Dowl. P. C. 1001, where justices in petty sessions to appoint overseers, in due time after the 25th of March, pursuant to the 54 G. 3, c. 91, in consequence of a difficulty with respect to certificates of appointments, they adjourned the consideration of the appointments to a day more than fourteen days after the 25th of March,—an appointment made with effect to them on such day of adjournment was held valid, as the sessions had become possessed of the subject-matter. Coleridge, J., in giving judgment, said: "Although the appointment is required to be made, by the 54 G. 3, c. 91, within fourteen days after the 25th of March, yet the general rule is, that, where such a provision is introduced, unless there are negative words in the statute providing that the appointment shall not take effect afterwards, such a provision is to be taken as directory."

That was the construction put upon the 43 Eliz. c. 2, and writs of mandamus have been issued, requiring justices to make appointments of overseers, the issue of which writs must have proceeded on the ground that the words of the statute were directory. No negative

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words are introduced into this statute, therefore its language must be regarded merely as directory." A similar consequence was held in *Cole v. Green*, 6 M. & G. 872, 7 Scott, N. R. 682, to result from the absence of negative or prohibitory words in a local paving act of 3 & 4 W. 4, c. lxviii, s. 151. "Here," said Tindal, C. J., "the statute says that contracts *shall* be signed by the commissioners, or by any three of them, or by their clerk: it does not say that they shall be *void* unless so signed. It appears to us, therefore, that this latter part of the 151st section is directory only. And this view is confirmed by the requisition which next follows,—that copies of all such contracts shall be kept in a book. If the former part of the clause is imperative, this must also be so. But it never can be supposed that the legislature intended to make contracts void, if copies are not duly made by the clerk of the commissioners." In *The York and North Midland Railway Company v. The Queen*, 1 Ellis & B. 858, an act for making a railway (12 & 13 Vict. c. lx) recited that the formation of the railway would be beneficial to the public, and that the company were willing to execute it; and the power of compulsorily taking lands, with the then ordinary powers, was given to the company: a mandamus having issued commanding the company to complete the line, it was held by the Exchequer Chamber,—reversing the decision of the court of Queen's Bench,—that the mandamus ought not to go, no duty being cast on the company to make the line; the words of the act being *enabling*, not *obligatory*, and there being nothing in the subject-matter or context to require that they should be construed as compulsory. [*Jervis*, C. J. That turned upon the question of contract.] In a recent case of *Macdougall v. Paterson*, antè, Vol. XI, p. 755, this court held,—over-ruling a case in the Exchequer, of *Jones v. Harrison*, 6 Exch. 328, 2 L. M. & P. 257,—that the word "*may*" in the

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13th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, which provides, that, in certain cases, the court or a judge at Chambers *may* by rule or order direct that the plaintiff shall recover his costs, is not used to give a *discretion*, but to confer a *power* upon the court and judges,—in other words, that it was imperative, upon a fit case being laid. The court of Queen's Bench afterwards adopted the view taken by this court: see *Orchard v. Mossy*, 2 Ellis & B. 206; *Crake v. Powell*, 2 Ellis & B. 210. (a) The matter was in the following session set at rest by the legislature: see 15 & 16 Vict. c. 54, s. 4. These authorities conclusively establish, that, where a statute gives power to a party to do an act, and there are no negative words, the act done is not void if done otherwise than in the manner directed by the legislature. In all cases of public trust, the act of the majority binds the whole: see Lewin on Trusts, 3rd edit. p. 237; Hill on Trustees, 297. [*Williams*, J. The statute here (s. 101) expressly says so.] The same rule binds the decisions of courts of law, and the deliberations of all public bodies. [*Williams*, J. The 13th section requires the list to be *alphabetical*: would the list be rejected, if that direction were not complied with?] Clearly not. The 17th section enacts that notice of objection shall be served upon “the overseers who shall have made out the list:” this court held, in *Points*, App., *Attwood* Resp., antè, Vol. VI, p. 38, 2 Lutw. Reg. Cas. 117, that the notice may be served upon an “assistant-overseer.” Suppose two of the overseers were to die before the last day of July, would their successors be bound to sign the lists? [*Cresswell*, J. Probably not: their duty would be merely to continue the duties of their predecessors.] The only object the legislature could have had in view,

(a) And see *Reid v. Gardner*, 8 Exch. 651.

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was, to secure the preparation of the lists by the proper persons : and that object would be sufficiently attained by holding this clause, or, at all events, this part of it, directory only.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court :—This was an appeal from the decision of a revising-barrister, which was argued the other day by Mr. Bailey before my Brothers Cresswell, Williams, and Crowder, and myself. The point discussed before us was, whether the 13th section of the Registration Act, 6 & 7 Vict. c. 18, was directory only, or compulsory, as to the signature of the lists of voters by the overseers. I now proceed to state the conclusion at which we have arrived.

The reform act gives the right of voting to persons possessed of certain qualifications, if duly registered. The right of voting is, therefore, conditional ; and, unless a party is duly registered, he has no right to vote. The 6 & 7 Vict. c. 18 prescribes the mode in which a register is to be made, and the proceedings to be taken for that purpose. By s. 13 it was enacted, that, in cities and boroughs, the overseers of every parish or township shall, on or before the last day of July in every year, make out an alphabetical list of all persons entitled to vote, and *shall sign* such lists, and shall publish copies of such lists on or before the 1st day of August in each year. By s. 35, the overseers are required to deliver to the revising barrister the lists by them made : and the question here is, whether a list duly made by the overseers, and delivered to the revising barrister, but not signed, was to be treated as a valid list, or as a nullity.

It was not disputed that the list had been made out by the overseers. No objection was made to the copies

published : but it was contended that the list delivered must be rejected altogether.

If, indeed, the 13th section is imperative, the list may be held altogether void, if not signed : but, if it is directory only, then, although the overseers may have neglected their duty, and be liable to punishment, the list may be revised by the barrister.

The object of the legislature, in requiring the publication of lists, appears to have been, to give all parties interested an opportunity of making and giving notice of claims and objections ; and that object will be attained by the publication of a list, although unsigned : indeed, the statute leaves it somewhat doubtful whether signatures are required to the copies published or not.

Assuming that those copies ought to be signed, the reason for requiring it is not very apparent : probably it may have been for the purpose of giving to persons interested an assurance that the list is authentic. But, if they assume that it is authentic, and give notices of claims and objections on that assumption, and it turns out that the list was not published by the overseers, the parties are still in as good position as if no list had been published by any one ; which case is provided for by the legislature : and, if they have sustained inconvenience and loss by the want of due publication, perhaps they may have a remedy against the offending overseers.

The reason for requiring signature to the list to be delivered to the revising barrister, is probably to identify it as the list originally made out by the overseers. But that may be proved by other evidence : and we think it would be unreasonable to treat that as essential to the list, which is no part of it, but merely added to authenticate it.

Before the registration act, 6 & 7 Vict. c. 18, this objection, if held destructive of the list, would have had the effect of disfranchising the whole parish and town-

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ship : and, although such a case is now provided for, the statute must be construed as the former act would have been : and we cannot suppose that the legislature intended such a consequence to follow from a formal omission of a signature. It appears to us, that, in this particular, the words of the act are to be considered as directory only, and that the revising barrister ought to have treated the unsigned list as valid.

The appeal therefore will be allowed, and the new list, as revised, will be the list of voters for the township in question.

Appeal allowed.

END OF THE REGISTRATION CASES.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

Exchequer Chamber,

IN

HILARY TERM,

IN THE

NINETEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO USUALLY SAT IN BANCO IN THIS TERM, WERE,—
JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., AND CROWDER, J.

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INNES v. THE EAST INDIA COMPANY.

Jan. 23.

THE following case was stated, after writ issued, without pleadings, for the opinion of the court, under the provisions of the Common Law Procedure Act, 1852, by virtue of an order of Williams, J., of the 23rd of October, 1855:—

On the 10th of February, 1851, the plaintiff obtained a judgment against one William Archer Shee in the Court of Queen's Bench, for 63*l.* 2*s.*, of which the sum of 12*l.* 4*s.* 7*d.* was at the time of making the order of attachment hereinafter mentioned, and thence hitherto has been, and still is, unsatisfied.

The said William Archer Shee was formerly a clerk

A superannuation allowance awarded by a resolution of the court of directors, pursuant to the 53 G. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a "debt" that is attachable under the 61st section of the Common Law Procedure Act, 1854.

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in the home establishment of the East India Company, the defendants, that is to say, in the correspondence department of the examiner's office in such establishment; and, on the passing of the resolution hereinafter mentioned, had been for twenty years and upwards in the department aforesaid in that establishment. On the 2nd of April, 1851, with the view of providing a superannuation allowance of 850*l.* per annum for the said William Archer Shee, a resolution of the court of directors of the said company was passed on that day under the powers in that behalf vested in the said court of directors by the 93rd section of the 53 G. 3, c. 15, which section, after reciting, that "it is reasonable that the said court of directors should have power to grant allowances in the nature of superannuations to such of their officers and servants in England as from age or infirmity may no longer be qualified for the execution of their several offices or employments," enacts, "that it shall and may be lawful to and for the said court of directors to make allowances, compensations, remunerations, or superannuations, to the officers and servants of the said company in England, subject to the restrictions and according to the conditions and proportions following, that is to say, where it shall be proved to the satisfaction of the said court of directors that any such officer or servant, being under sixty years of age, shall be incapable, from infirmity of mind or body, to discharge the duties of his office, in such case, if he shall have served with diligence and fidelity in the service of the said company for ten years, it shall and may be lawful to grant him by way of superannuation any annual sum not exceeding one third of the salary and allowed emoluments of his office; if above ten years, and less than twenty years, any such sum not exceeding one half of such salary and allowed emoluments; if above twenty years, any such sum not exceeding two thirds of such salary and allowed

emoluments. If such officer or servant shall be above sixty years of age, and he shall have served fifteen years or upwards, it shall and may be lawful, without proof of infirmity of mind or body, to grant him by way of superannuation any annual sum not exceeding two thirds of the salary and allowed emoluments of his office; if sixty-five years of age or upwards, and he shall have served forty years or upwards, any such sum not exceeding three fourths of such salary and allowed emoluments; if sixty-five years of age or upwards, and he shall have served fifty years or upwards, any such sum not exceeding the whole of such salary and allowed emoluments. All which allowances so to be made shall be charged in the books of account of the said company to the debit of that branch of the company's affairs to which the said officers or servants may respectively belong, anything in the said act of the 33 G. 3, c. 52, to the contrary notwithstanding."

The said resolution was in the words and figures following, that is to say:—"Resolved, that, under the medical certificates which attest, that, from the impaired state of health of Mr. W. A. Shee, a clerk in the correspondence department of the examiner's office, there is no hope of his being able to resume his duties with efficiency, that Mr. Shee, who has served upwards of twenty years, be permitted to retire from the company's service accordingly; and that he be granted a superannuation allowance of three hundred and fifty pounds (350*l.*) per annum, under the powers vested in the court by the act of 53rd G. 3, c. 155, s. 98."

In pursuance of this resolution, the said William Archer Shee was permitted to retire from the service of the said company; and the said allowance has from time to time since the passing thereof, and by virtue of the same, been paid to him by the said company on the production by him of a life-certificate, by equal quarterly

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payments, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in each year; but no grant of the said allowance has ever been made to the said William Archer Shee by the said company under their common and corporate seal.

The said William Archer Shee is still living; and, on the 29th of September, 1855, a quarterly payment on the said allowance became payable to him under the said resolution, and would have been paid to him in the usual course on that day, but for the said order of attachment made on the 25th of September, 1855, by Mr. Justice Willes.

On the 25th of September, 1855, the plaintiff made an ex parte application to Mr. Justice Willes under the 61st section of the Common Law Procedure Act, 1854, upon an affidavit, stating that, on the 10th of February, 1851, the plaintiff recovered judgment against W. A. Shee for the sum of 63*l.* 2*s.*, and that there was then justly due and owing to him thereon, and the said judgment was still unsatisfied, the sum of 42*l.* 4*s.* 7*d.*, and that the East India Company were indebted to the said W. A. Shee in a sum of money more than equal to the sum so due upon the said judgment.

On the day and year last mentioned, the following order was made by Willes, J. :—

“ In the Queen’s Bench.

“ George Rose Innes,
 “ Judgment-creditor.
 against
 “ William Archer Shee,
 “ Judgment-debtor.
 “ East India Company,
 Garnishees.

} Upon hearing the attorneys
 or agents for the judgment-
 creditor, and upon reading the
 affidavit of George Rose Innes,
 I do order that all debts due
 and owing or accruing due
 from the above-named gar-

nishees to the above-named judgment-debtor, be attached to answer a judgment recovered against the above-named judgment-debtor on the 10th of February, 1851,

by the above-named judgment-creditor, in the court of Queen's Bench, for the sum of 63*l.* 2*s.*, of which said sum there remains now due on the said judgment the sum of 42*l.* 4*s.* 7*d.* I further order that the above-named garnishees, their attorney or agent, attend me at my chambers in Rolls-Garden, Chancery Lane, on Friday, the 5th of October next, at 11 of the clock in the forenoon, to shew cause why they should not pay the judgment-creditor the debt due from them to the judgment-debtor, or so much thereof as may be sufficient to satisfy the said judgment-debt. Dated, the 25th of September, 1855."

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This order was served on the company on the 27th of September, 1855; and, on or about the 3rd of October, 1855, the following affidavit was sworn and filed by Henry Smith Lawford, attorney for the East India Company:—

"In the Queen's Bench.

"George Rose Innes, judgment-creditor,
against

"William Archer Shee, judgment-debtor,

"The East India Company, garnishees.

"I, Henry Smith Lawford, of &c., attorney for the East India Company, the above-named garnishees, make oath and say,—1. That the said East India Company are not, as I verily believe, indebted to the said William Archer Shee, nor is there any debt due or accruing due to him from the said company; and the said company dispute that any debt was at the time of the service of the order of Willes, J., made herein on the 25th of September, 1855, or is now, due and owing or accruing due from them to him the said William Archer Shee: 2. And I further say that the said William Archer Shee was heretofore a clerk in the home establishment of the East India Company, in London, and had been in such establishment for twenty years

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and upwards on the 2nd of April, 1851; on which day a resolution of the court of directors of the East India Company was passed in the words and figures following, that is to say [setting out the resolution, *ut antè*. p. 353]: 3. And I further say that the said allowance hath from time to time been paid by the said company to the said William Archer Shee, in virtue of such resolution, on production by him of a life-certificate, but no grant of such allowance under seal hath ever been made to him by the said East India Company: 4. And I further say that the said supposed sum of money in which the said East India Company are by the affidavit of the said George Rose Innes alleged to be indebted, is, as I verily believe, the said superannuation allowance hereinbefore mentioned."

On or about the 6th of October, 1855, cause was shewn before Willes, J., against the said order, by the said Henry Smith Lawford on behalf of the defendants, in the presence of the attorney of the plaintiff; and, after hearing the attorneys on both sides, the said Mr. Justice Willes, on the said 6th of October, 1855, made the following order:—

"In the Queen's Bench.

<p>" <i>George Rose Innes,</i> " Judgment-creditor. " <i>William Archer Shee,</i> " Judgment-debtor. " <i>East India Company,</i> " Garnishees.</p>	}	<p>" Upon hearing the attorneys or agents for the judgment- creditor and for the garnishees, and upon reading the affidavit of Henry Smith Lawford, I do order that the plaintiff may, if he think proper, proceed against the garnishees by writ of summons; a special case to be stated, without plead- ings, for the opinion of the court in which the writ issues, to be delivered upon appearance being entered, and returned in a week, and set down for argument in next term at latest; and the question to be argued shall be, whether the debt is attachable. If plaintiff does not</p>
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ie out the writ in four days, or make default in proceeding as above, then I order that the attachment shall be dissolved. Dated the 6th of October, 1855."

The said quarter's superannuation allowance is still unpaid.

In conformity with the said last-mentioned order, a writ of summons was on the 9th of October, 1855, issued by the plaintiff against the defendants; and the above special case has been stated, in pursuance of the said order of Mr. Justice Williams, of the 23rd of October, 1855.

The question for the opinion of the court, is, whether the said quarter's superannuation allowance is attachable to the balance of the said judgment-debt so remaining unsatisfied as aforesaid, under the provisions of the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

Shee, Serjt., for the plaintiff. The question for the opinion of the court upon this special case, is, whether the superannuation allowance awarded to the judgment-debtor by the resolution of the court of directors of the East India Company, of the 2nd of April, 1851, was a debt owing or accruing from the company to the judgment-debtor, within the meaning of the 61st section of the 17 & 18 Vict. c. 125. [*Jervis*, C. J. Or, in other words, whether the judgment-debtor had such a claim upon the company as would enable him to sue them for it.] Precisely so. The difficulty the plaintiff has to contend with, is, that the superannuation allowance is a mere gratuity, or, if a debt, is not granted in the way in which corporations ordinarily can only bind themselves, viz. under seal. A question somewhat resembling this was already been under the consideration of this court in a case of *Gibson v. The East India Company*, 5 N. C. 62, 7 Scott, 74, where it was held that the retiring

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pension of a military officer of the company does not, upon his bankruptcy, pass to his assignees. Tindal, C. J., in delivering the judgment of the court,—after adverting to the cases which shew the extent to which the common law rule as to the incapacity of corporations to bind themselves otherwise than under seal, has from time to time been relaxed,—says: “It was, indeed, strongly argued at the Bar, that, as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company, and in the nature of a contract. But we think there is no ground for giving such operation to the act. The object of the statute 33 G. 3, c. 52, was, that of creating a board of commissioners to superintend, direct, and control the acts, operations, and concerns relating to the civil and military government or revenues of the company’s territories and acquisitions in the East Indies; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal objection to the resolution itself beyond that which it originally possessed. The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations,—‘obligations which want the vinculum juris,’ although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound in foro conscientiae to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a court of law.” There are, however, material distinctions between that case and the present. There, the pension was claimed on the faith of a general resolution, not of one addressed, as here, to the individual case, or made in pursuance of a personal claim. Nor was it granted under the authority of an act of parliament. This, it is

submitted, is a contract that may well be made without seal. The corporation consists of a court of proprietors, a court of directors, and a secret committee appointed under the act by the court of directors. Although every act of the general body may require the authentication of the corporate seal, it does not follow that a resolution of the court of directors like that in question may not bind them, though not under seal. The court of directors acts only by resolution: it has no seal. [*Jervis*, C. J. Suppose the statute, reciting that the company are possessed of estates in England, impowers the court of directors to make a grant of the right of sporting thereon,—could they do so otherwise than by deed under seal?] Probably not. The 93rd section of the 53 G. 3, c. 155, enacts that the “allowances so to be made [by the resolutions of the court of directors] shall be charged in the books of account of the said company to the debit of that branch of the company’s affairs to which the said officers or servants may respectively belong.” Does not that constitute the allowance a “debt?” [*Jervis*, C. J. It is merely prescribing a mode of keeping the accounts.] It is something more: it in effect sanctions the making of the allowance, and provides for the reimbursement out of the territorial revenues of the company. The court of directors are empowered by resolution to make a contract on behalf of the company: and the 88th section of the act provides, that “it shall not be lawful for the said court of directors to charge the funds of the said company with the payment of any gratuity to any officer, civil or military, or other person, exceeding the sum of 600*l.*, unless the grant or resolution for that purpose shall have been sanctioned by the court of proprietors, and approved and confirmed by the board of commissioners for the affairs of India; and that copies of all warrants or instruments granting any salary, pension, or gratuity,

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shall be submitted to both Houses of Parliament, within one month after such grant, if parliament shall be then sitting, or, if not, within one month after their then next meeting." [Williams, J. How can past services be a consideration for a promise not under seal? Crowder, J. The 88th section treats it as a mere gratuity.] This is not a pure gratuity: it is in the nature of a parliamentary grant, in consideration of past services. It can scarcely be denied that it would be competent to the company to make an act of its governing body binding upon it.

Sir F. Theiger and Forsyth, for the defendants, were not called upon. (a)

JERVIS, C. J. I am of opinion that the defendants are entitled to judgment. The superannuation allowance in question clearly is not a debt within the meaning of the 61st section of the Common Law Procedure Act, 1854. It is true, the 93rd section of the 53 G. 3

(a) The points intended to be argued on the part of the defendants, were as follows:—

"1. That the sum sought to be attached must be a legal debt within the meaning of the Common Law Procedure Act, 1854, and such a debt as Mr. Shee himself would have the right to enforce payment of:

"2. That the resolution of the court of directors created no legal liability on the East India Company to pay Mr Shee the allowance in question:

"3. That, to be binding upon the East India Company, the allowance in question should have been granted

by deed under the seal of the company:

"4. That the East India Company are not garnishees within the meaning of the 61st and 62nd sections of the Common Law Procedure Act, 1854:

"5. That the East India Company, being a corporate body, do not come within the meaning or definition of the word 'person,' to which the term 'garnishee' is applied by the Common Law Procedure Act, 1854; and that therefore the provisions of the 61st and 64th sections of the said act are inapplicable to the company."

c. 155, authorises the court of directors to award these retiring allowances. But it clearly is not a debt within the meaning of the Common Law Procedure Act. It is not a debt at all, but a mere gratuity.

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CRESSWELL, J. I am of the same opinion. The distinctions suggested by my Brother Shee fail to take the case out of the authority of *Gibson v. The East India Company*.

WILLIAMS, J., and CROWDER, J., concurred.

Judgment for the defendants.

BROWNE and Others v. EMERSON.

Jan. 30.

THIS was an action to recover the sum of 954*l.* 9*s.* 8*d.*, a balance alleged to be due to the plaintiffs for goods sold and delivered. The declaration, which was delivered on the 17th of November last, contained counts for goods sold and delivered, for money lent, money paid, and money found due upon an account stated. The defendant pleaded *nunquam indebitatus*, payment, and set-off.

Under the 3rd section of the Common Law Procedure Act, 1854, it is competent to a judge at Chambers to refer the whole matter in dispute, though some of the items of the account may be disputed.

An application was made to Cresswell, J., at Chambers, for an order under the compulsory clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, to refer the cause to arbitration. The counsel who attended on behalf of the defendant in support of the application, stated to the learned judge, that the items of the account of the plaintiffs' claim,—which account contained the enumeration of twenty-seven bills for various stores, provisions, wine, beer, and other goods alleged to have been sold and delivered by the plaintiffs to the defendant, the bills consisting of numerous items specifying each of

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the articles said to have been supplied by the plaintiffs to the defendant, with the prices thereof,—or some of them, were disputed; whereupon the learned judge said, that, according to his construction of the act, he had no power to refer the cause; that the act gave power to a judge to refer mere matters of account; and that, where items in the account were disputed, the case consisted of more than mere matter of account, and he had no power to order a reference.

Byles, Serjt., in Michaelmas Term last,—upon affidavits stating, that the matters in dispute in this action consisted of mere matters of account, which could not conveniently be tried in the ordinary way; that, if the cause were taken down to trial, the result necessarily would be a reference of the same and all matters in difference to arbitration; and that the defendant claimed a set-off to a large amount for commission and brokerage due to him as agent of the plaintiffs, and also for goods sold and delivered, money lent, money paid, and money received, and money due upon an account stated, which several claims of the defendant extended over several years, and comprised various items of account, and exceeded the sum sought to be recovered by the plaintiffs in this action,—obtained a rule calling upon the plaintiffs to shew cause why the cause and the matters in dispute therein should not be referred to the arbitration of one of the masters of this court, or of some other arbitrator, upon such terms as the court should direct, pursuant to the Common Law Procedure Act, 1854.

Channell, Serjt., on a subsequent day, shewed cause, upon an affidavit stating, that the plaintiffs disputed their liability to the items claimed in the defendant's set-off; and that, for one of the items, being a balance of account in the particulars of the plaintiffs' claim, the

plaintiffs held the I. O. U. of the defendant, and also the defendant's acknowledgements for most of the items in the particulars of the plaintiffs' claim, being cash advances to the said defendant. The 3rd section of the Common Law Procedure Act, 1854, upon which this question turns, enacts, that, "if it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute *consists wholly or in part of matters of mere account* which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county-court, upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." The matter in dispute does not consist of mere matter of account, and therefore the learned judge would not have been justified in referring it. The account was disputed; and the defendant's set-off was disputed. The plaintiff and defendant are both, it appears, resident in India. If the cause is referred, and their examination is necessary, it cannot be had: whereas, if the cause proceeds to trial in the ordinary way, a mandamus may go. That is an additional reason why the case should not be taken out of the ordinary course.

Byles, Serjt., in support of the rule. This case, it is submitted, is clearly within the provisions of the act. The jurisdiction of the judge under s. 3, is not confined

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to mere matters of account. The different language employed in that and in the 6th section (a), shews that the judge at chambers was intended to exercise his discretion where *part* only of the matter consists of matter of account. Here, the general liability is not denied: all that the defendant contests, is, the accuracy of the accounts. The judge clearly may refer the whole or part only, in his discretion.

It being intimated to the court that there was another case pending in which the same question would have to be argued,—*Harvey v. Nicolay*,—and the rule in that case having been enlarged, the court directed that this rule should be enlarged also until after the argument of that case.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

This case was argued on the last day of the last Michaelmas Term, before my Brothers Williams, Crowder, and Willes, and myself. The court postponed their judgment, in order that they might hear the argument in another case (*Harvey v. Nicolay*) in which the same

(a) Which enacts, that, "if upon the trial of any issue of fact by a judge under this act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county-court,

upon such terms as to costs and otherwise as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made."

question arose. That case, however, having since been settled without argument, we are remitted to our original duty to dispose of this case, without hearing any further discussion : and accordingly I now proceed to state the conclusion at which, after full consideration, we have arrived.

This was an application to refer the matters in dispute in this cause to one of the masters, pursuant to the Common Law Procedure Act, 1854. The application had been refused by my Brother Cresswell, at Chambers, and, being renewed here, was in the nature of an appeal from his decision, with the view of ascertaining the construction the court would put upon the 3rd section of that statute.

The action was brought for goods sold and delivered, for money lent, for money paid, and upon an account stated. The defendant pleaded *nunquam indebitatus*, payment, and set-off. The defendant's attorney stated that the matters in dispute in this action consisted of matters of mere account, which could not be conveniently tried in the ordinary way : but it appeared from the affidavit of the plaintiffs' attorney, that some of the items of the plaintiffs' claim, and also of the defendant's set-off, were disputed by the respective parties. Under these circumstances, my Brother Cresswell refused to refer the cause, being of opinion that the statute did not authorise a compulsory reference of the whole matter in dispute, where any of the items in the account are disputed.

Upon the discussion of this rule, it was not denied that the case was a fit case for a reference, if the statute applied : and the only question raised, was, whether there could be a compulsory reference of the whole matter in dispute in a case where some of the items of account on each side were disputed between the parties.

We are of opinion that a compulsory reference of the whole matter in dispute may be ordered under such

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circumstances. The power to act is given by the 3rd section, "where the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way," and would seem to attach in every case where part only of the matter in dispute is mere account, if not limited by the subsequent words of the section, "that such matter, either wholly or in part, be referred."

Having regard to the words thus used in different parts of the section, it may mean, that, where the matter in dispute consists wholly of matters of mere account, the whole may be referred, and that, where it consists in part of matters of mere account, such part only may be referred; or it may mean, that, where the matter in dispute consists either wholly or in part of matters of mere account, the compulsory reference may be either of the whole matter in dispute, or of part only of the matter in dispute, as the court or judge may think fit. The former seems to be the construction which was put upon the section by my Brother Cresswell. The latter, in our opinion, is the true construction. The former construction will make this part of the statute almost nugatory. The appointment of a compulsory referee whose sole duty will be the addition of undisputed items, will be an unproductive expense; and this provision of the statute, which was supposed to be of great importance, will become a dead letter. But there are considerations arising from the section itself, and from other sections, which satisfy us that the latter is the true construction. Where the matter in dispute consists wholly or in part of matters of mere account, &c., the court or a judge may decide such a matter, that is, the matter in dispute, in a summary manner. The words "wholly or in part" do not occur a second time in this branch of the section, to limit the authority of the court: on the contrary, they are studiously left out; and the

matter in dispute, that is, the whole matter, may be decided in a summary manner, where it consists wholly or in part of matter of mere account, &c. But the same matter which may be decided in a summary manner, may, under the same circumstances, if the court shall think fit, be referred, either wholly or in part, to an arbitrator, instead of being decided in a summary manner. And, if the court may decide in a summary manner the whole matter in dispute, where a part only consists of matters of mere account, it would seem to follow, that, in like manner, the whole may be referred, where a part only consists of matters of mere account. The repetition of the words "wholly or in part," in the second branch of the section, shews clearly that the matter to be decided or referred, is, the matter in dispute, and not the matters of mere account of which the matter in dispute consists; because it would be absurd to say, that, where part of the matter in dispute is matter of mere account, a part only of such matter of mere account may be referred.

But the 4th and 5th sections lead us to the same conclusion. By the 4th section, issues of fact or law may be directed as to particular items; and, by the 5th section, the arbitrator, upon a compulsory reference, may state a case for the opinion of the court. If the compulsory arbitrator is to be confined to the examination and addition of items of mere admitted accounts, it is difficult to imagine a case to which these sections would be applicable; for, wherever the account is not admitted in the form in which it is rendered, for instance, where an application of a particular payment is disputed, it ceases to be a matter of mere account, and the power to refer would not attach.

We conclude, therefore, from these sections, that the compulsory reference was intended to include matters in dispute which might fitly be determined by an issue to

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be directed by the court, or by a case to be stated by the arbitrator, and that the authority to refer is not restricted to those cases only in which no item is disputed, and which involve mere matters of account.

For these reasons, we are of opinion that the rule ought to be made absolute.

It does not follow from this decision, that every case ought to be referred which involves matters of mere account. The rule is well laid down in the case of *Taff Vale Railway v. Nixon*, 1 House of Lords' Cases 125, and was probably the origin of the provision now under discussion.

Rule absolute.

Jan. 23.

Under s. 31 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the question whether or not a document offered in evidence requires to be, or is sufficiently, stamped, is to be decided by the judge at nisi prius, and cannot properly be reserved for the opinion of the court.

Practice as to delivery of paper-books, on appeals from county-courts.

TATTERSALL, Appellant; FEARNLEY, Respondent.

THIS was an action brought by the plaintiff, a stone-mason, against the defendant, a builder, under the following particulars of demand:—"This action is brought to recover the sum of 41*l.* 18*s.* 7*d.*, the balance of account due to the plaintiff by the defendant, for work and labour by the plaintiff for the defendant, at his request, in the erection of eleven houses, three cellar kitchens, ash places, &c, at Bradford Moor, as per account annexed."

An account was annexed, shewing particulars of work amounting to 121*l.* 16*s.* 6*d.*; and credit was given to the plaintiff for 79*l.* 17*s.* 11*d.* paid, leaving the balance sued for.

It appeared in evidence on the trial in the Bradford county-court, on the 21st of November last, that the plaintiff had commenced the erection of six houses for the defendant; but that the defendant suddenly altered his views as to those houses, and proposed to erect eleven

houses on a less expensive scale ; and that the defendant asked the plaintiff to say what sum he would require for the labour for the mason's work in the erection of the eleven houses ; and that the defendant referred the plaintiff to one John Jackson (who acts occasionally as the defendant's agent) to describe to the plaintiff the nature of the works required ; that the plaintiff accordingly met Jackson at the defendant's house, on the 10th of November, 1854 ; and that, on that occasion, the plaintiff offered to perform the work as described to him by Jackson, in the erection of such eleven houses (for labour only, the defendant finding all materials), for the sum of 77*l.* ; and that the defendant then entered the room, and desired Jackson to give the plaintiff his price ; that a document was thereupon written out by Jackson, and signed by the plaintiff in the presence of the defendant, but not signed by the defendant, of which the following is a copy, and which document is unstamped :—

“Bradford, November 10th 1854.

“An estimate for the masonry for eleven houses to be built on Bradford Moor for Mr. Pratt Tattersall. The work to be done in a good manner, to the satisfaction of the proprietor, for the sum of 77*l.* : plans and specifications prepared by Samuel Jackson. Dated November, 1854. The plans, &c., named, to be binding.”

(Signed) “James Fearnley.”

The plaintiff performed the labour in the mason's work in the erection of the eleven houses, upon the terms of the document he had signed : but, on the completion of the work, he alleged that three cellar kitchens in three of the houses erected by him were extra work, and not included in that document. It also appeared in evidence on the trial, that, although the document before mentioned referred to specifications for the plaintiff's guidance, no specifications of the works had then been prepared ; but that the plaintiff acted from verbal

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directions. It appeared, however, that the plans referred to in the document *were* prepared.

In the course of the trial, it became necessary to produce the document above mentioned; when the defendant's counsel, on the part of the defendant, objected that the document was inadmissible, as it was an agreement, and required a stamp; and that, it not being stamped, the plaintiff should be nonsuited. The judge of the county-court refused to nonsuit the plaintiff; and decided that the document was not an agreement in writing requiring a stamp, because, amongst other reasons, it was not signed or accepted in writing by both parties, and did not contain the whole terms of the contract between them.

It was thereupon, on the suggestion of the judge, referred to two practical surveyors to ascertain what, if anything, was due to the plaintiff from the defendant for the work in question, subject to the defendant's right to appeal from the decision of the judge upon the objection taken by the defendant's counsel to the before mentioned document.

The surveyors certified that there was *6l. 6s. 4d.* due from the defendant to the plaintiff; and a verdict was entered for the plaintiff for that amount.

The questions for the opinion of the court, were—First, whether, under the circumstances stated, the document set out in the foregoing case was an agreement requiring a stamp,—Secondly, whether the refusal of the judge of the county-court to nonsuit the plaintiff on the ground that the document was not stamped, was wrong in point of law.

J. Addison, for the appellant. (a) The question is,

(a) When the case was called on, it was found that the parties,—relying on the 14th section of the 13 & 14 Vict. c. 61,—had only delivered *two* paper-books. *Jervis*, C. J., observed

whether the agreement produced before the judge of the county-court required a stamp. The case is not within s. 31 of the Common Law Procedure Act, 1854 (*b*),—which is extended by s. 103 to “every court of civil judicature in England and Ireland,”—inasmuch as this is not an application for a new trial. [*Jervis*, C. J. Is this a question which the judge had power to reserve for this court?] The question was reserved for the court in *Eames v. Smith*, 1 Jurist, N. S. 1025. [*Jervis*, C. J. We had that case before us in the last term, in *Siordet v. Skuczynski*, antè, p. 251, and we held expressly that a question as to the sufficiency of or the necessity for a stamp ought not to be reserved for the court, but that the legislature intended those matters to be finally disposed of by the judge at the trial. We must adhere to that decision.]

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J. Brown, for the respondent.

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Appeal disallowed.

that, inasmuch as these appeals are now (by the 15 & 16 Vict. c. 54, s. 2,) heard by the full court, paper-books should be delivered to each of the judges; and that, in future, he would not allow a case to be argued unless this rule were adopted.

(*b*) Which enacts that “no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.”

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THE MIDLAND RAILWAY COMPANY, Appellants;
BROMLEY, Respondent.

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A., a passenger by the M. railway from Gloucester to Bristol, on arriving at the terminus at Bristol, told a porter there that he wished to proceed by the B. & E. railway (whose station closely adjoined that of the M. railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the B. & E. station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended an incline to the departure platform of the B. & E. railway. There was no evidence that the portmanteau was ever afterwards seen; and it never reached Torquay.

In an action against the M.

Railway Company for the loss.—Held, that there was no evidence of a breach of their contract to deliver either to A., or at the departure platform of the B. & E. railway.

THIS was an action brought in the county-court of Gloucestershire holden at Bristol, to recover the sum of 27l. 16s., the value of a portmanteau and its contents, alleged to have been lost by the carelessness of the defendants' servants.

The plaintiff below, by his plaint, alleged, that, on or about the 26th of April last, he was rightfully possessed of a portmanteau and its contents, and on that day the plaintiff delivered to the defendants the said portmanteau and its contents, and became a passenger by the defendants' railway from Gloucester to Bristol: and the defendants, for the usual fare or reward to them paid by the plaintiff, undertook safely and securely to carry and convey the plaintiff and his said portmanteau and its contents from Gloucester to Bristol aforesaid, and at the end of the journey to safely and securely deliver up the same; and that, by the carelessness and negligence of the defendants, or their servants, the said portmanteau and its contents were wholly lost to the plaintiff.

On the 26th of April, 1855, the plaintiff took his place at Gloucester as a passenger by the Midland railway to Bristol, and his portmanteau was placed in the luggage-van.

The train arrived at the Bristol terminus later than its usual time; and, on its arrival, the plaintiff informed one of the porters of the company that he wished to proceed by the Bristol and Exeter railway by a train

which was then about to start from the terminus of the latter company.

This terminus is about fifty yards distant from the terminus of the Midland railway; and there is an open uncovered space between the two stations.

The porter obtained the plaintiff's portmanteau from the platform where it had been deposited from the luggage-van, and placed it with other luggage on a truck, for the purpose of taking it across with such other luggage to the station of the Bristol and Exeter railway.

At the Bristol and Exeter station there are three platforms,—one on each side of the line of railway, and the other on a branch line. The one nearest to the Midland railway station was the platform where passengers arriving in Bristol from Exeter alighted; and the more distant one was the platform from which some trains leaving Bristol for Exeter departed. The booking-office of the Bristol and Exeter company is upon the former of these platforms.

The plaintiff stated, on the trial, that, after his portmanteau was so placed by the porter upon the said truck, he saw the porter with the said truck upon which the said portmanteau had been placed, enter the Bristol and Exeter station, pass down an incline from the nearest (the arrival) platform, cross the lines at the head of the station, and ascend an incline to the farthest (the departure) platform of the Bristol and Exeter railway; and that he afterwards saw the said truck on the far side of the Bristol and Exeter station; but he did not see the said portmanteau after he saw it on the Midland railway platform: that he, the plaintiff, whilst the truck was so crossing, went to the said booking-office of the Bristol and Exeter railway, to obtain his ticket for Torquay, and, having obtained it, went across to the train, and asked the guard of the Bristol and Exeter train if his portmanteau was in the luggage-van; that

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the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at Torquay; that, on his arrival at Torquay, he could not find, nor has he since found or heard of, his portmanteau.

The judge of the county-court decided, that there was no delivery of the plaintiff's portmanteau, either to himself, or to the Bristol and Exeter railway company, according to the defendants' contract, and so as to determine their liability; and gave judgment for the plaintiff for 27l. 16s., the full amount of his claim. Against this judgment, the Midland Railway Company appealed.

Phipson, for the appellants. The question is, whether the plaintiff in this case (the respondent) proved the mis-delivery of the portmanteau by the servants of the Midland Railway Company. Their contract was, to carry the plaintiff and his portmanteau, and to deliver it at Bristol. Arrived at Bristol, there was an end of that contract: the plaintiff gave the portmanteau a new destination; he informed the porter that he wished to go on by the Bristol and Exeter railway, and accordingly the porter placed it on a truck, and took it across the line of the Midland railway to the platform of the Bristol and Exeter railway. This case differs materially from *Richards v. The London, Brighton, and South Coast Railway Company*, antè, Vol. VII, p. 839, 6 Railway Cases, 49, and *Butcher v. The London and South Western Railway Company*, antè, Vol. XVI, p. 13. The question in both those cases, was, whether there had been a delivery of the dressing-case or the carpet-bag according to the usual course, viz, to the carriage or cab *within* the company's station. In the latter case, Jervis, C. J., says: "The case of *Richards v. The London, Brighton, and South Coast Railway Company* establishes, that, though not in express terms engrafted into it, it is

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a part of the contract of a railway company with its passengers, that their luggage shall be delivered at the end of their journey by the porters or servants of the company into the carriages or other means of conveyance of the passengers from the station." [Cresswell, J. Is it not as usual for the porters of the company to carry luggage to carriages *outside* the station? What difference can it make whether the porter takes it to a carriage outside the station, or to another railway adjoining?] As soon as the portmanteau quitted the premises of the Midland Railway Company, it became under the care and subject to the control of the Bristol and Exeter Railway Company. The case finds, it is true, that the two lines are only fifty yards apart. But, suppose, on the arrival of a passenger at the terminus of the Brighton railway, one of the company's porters were to take his luggage to the Waterloo Road station of the South Western railway. [Cresswell, J. In that case, the porter would not be acting within the scope of his employment.] Then, take the instance of the Dover or the Greenwich railway. [Jervis, C. J. The case does not in terms find it; but practically we all know (and the county-court judge would no doubt state the fact to be so, if the case were sent back to him,) that these two companies work together for their mutual accommodation.] It may as well be assumed that it was the usual course for the porters of the Midland Railway Company to convey to the Bristol and Exeter railway the luggage of passengers wishing to go by that line. [Williams, J. It is a mode adopted by each company for the purpose of more expeditiously clearing the platforms.] Still it lay on the plaintiff to prove that the porter failed to deliver the portmanteau to the Bristol and Exeter railway. The loss was not discovered until the arrival of the train at Torquay: for anything that appears, the portmanteau might have been lost while on the Bristol

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and Exeter railway. [*Crowder, J.* It is left ambiguous whether or not the portmanteau ever reached the Bristol and Exeter railway.] The onus of proving a non-delivery according to the defendants' contract, lay on the plaintiff. [*Jervis, C. J.* The judge seems to assume that the loss took place during the transit from the one side of the railway to the other. Putting the portmanteau into the truck was no delivery to the plaintiff.] It must not be assumed that it was the porter's duty to place the portmanteau in the luggage-van of the Bristol and Exeter train. [*Jervis, C. J.* No. His duty would be discharged when he delivered it on the platform there. *Cresswell, J.* Was there any evidence that it was ever delivered there?] All the evidence upon the subject was that given by the plaintiff himself, who stated, that "after his portmanteau was placed by the defendants' porter upon the truck, he saw the porter with the truck enter the Bristol and Exeter station, pass down an incline from the nearest (the arrival) platform, cross the lines at the head of the station, and ascend an incline to the farthest (the departure) platform of the Bristol and Exeter railway; and that he afterwards (not saying when) saw the truck on the far side of the Bristol and Exeter station; but he did not see the portmanteau after he saw it on the Midland railway platform." Suppose, in the case of *Butcher v. The London and South Western Railway Company*, the plaintiff had proved that he saw the porter going towards the cab with the carpet-bag, and that, on reaching home, he could not find it,—would that have been evidence enough to charge the company? In *Gilbart v. Dale*, 5 Ad. & E. 543,—where it was held, that, in an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby the consignor lost his goods, it is not sufficient to prove that they never reached their destina-

tion or were accounted for,—Coleridge, J., puts this case: "Suppose goods were left with a carrier to be taken by him to York, *and from thence forwarded to Edinburgh*, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?" (a) That is precisely this case. Why is it to be assumed that the defendants' duty was not completely performed? The portmanteau and truck are traced to the departure platform of the Bristol and Exeter railway. And the only evidence upon which it is sought to charge the defendants with a breach of their contract to deliver, is, that, when the other train reached Torquay, the portmanteau was not to be found. That clearly was no evidence to justify a verdict for the plaintiff.

Byles, Serjt., *contra*. The first question to be considered, is, what rule of construction the court will apply to cases of this sort. This is a question of fact, or at all events of fact so blended with the law that it becomes one in which it was not intended by the legislature that it should be the subject of an appeal, unless the court can clearly see, that, in coming to the conclusion he did, the judge of the county-court *must* have taken an erroneous view of the law: see the observations of Maule, J., in *The East Anglian Railways Company v. Lythgoe*,

(a) The learned judge could hardly have put the proposition in the terms stated,—seeing that it necessarily shews that a part of the contract supposed, was, that the carrier who received the goods should put them in motion towards Edinburgh. In the report in 1 N. & P. 25, the passage runs thus,—“Suppose a case where there are two or three carriers, and

one undertakes to carry to York, another to Newcastle, and the third to Edinburgh,—would it be enough to shew, as against the first carrier, *who undertook to deliver at York*, that the goods had not arrived at Edinburgh?” This, though equally obscure, is evidently somewhat nearer the meaning of the learned judge.

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antè, Vol. X, pp. 756, 757; followed by *Cawley*, App., *Furnell*, Resp., antè, Vol. XII, p. 29, and *Cuthbertson*, App., *Parsons*, Resp., antè, Vol. XII, p. 304. [*Cresswell*, J. The observations of my Brother Maule in *The East Anglian Railways Company v. Lythgoe* seem to be more accurately given in the 20th Law Journal, C. P. 88.] The judge of the county-court was clearly warranted by the evidence in deciding, as he did, that there was no delivery of the portmanteau either to the plaintiff himself or to the Bristol and Exeter Railway Company, according to the defendants' contract. It appears that the plaintiff was a passenger by the Midland railway from Gloucester to Bristol; that, on the arrival of the train at Bristol, he informed one of the company's porters,—without giving him any specific directions,—that he wished to proceed by a Bristol and Exeter train then about to start from the adjoining terminus of the latter company; that the porter, in the ordinary course of his duty, took the plaintiff's portmanteau, and, placing it upon a truck with other luggage, proceeded to cross the lines of the Midland railway towards the departure platform of the Bristol and Exeter railway. There was abundant evidence to shew that the portmanteau never passed over the dividing line between the two railways. [*Cresswell*, J. On the contrary, the case shews that the plaintiff saw it carried across the lines of the Bristol and Exeter railway, and up an incline to the farthest or departure platform of that railway.] There is a statement that *the truck* was seen there; but the portmanteau was not seen after the plaintiff saw it on the Midland railway platform. The porter, who might have been called as a witness, was not called. It may, therefore, fairly be said that the portmanteau was not upon the truck when it passed the dividing line. Whether it was or was not, was a fact which might with perfect propriety have been decided, as it has been, in favour of the plaintiff.

[*Cresswell*, J. There is pretty strong evidence on the case that the plaintiff did not conclude, from the fact of his not seeing the portmanteau in the truck as it ascended the incline, that it was not there.] The same might have been said in the case of *Richards v. The London, Brighton, and South Coast Railway Company*. The judge here finds that there was an implied contract on the part of the defendants to deliver the portmanteau either to the plaintiff personally or to the Bristol and Exeter Railway Company, and that they did neither. This is like the Woodside ferry case, *Walker v. Jackson*, 10 M. & W. 161 (a), which was twice tried, and on each occasion resulted in a verdict for the plaintiff. [*Jervis*, C. J. Why are we to assume that the plaintiff's portmanteau was stolen upon the Midland, rather than upon the Bristol and Exeter railway? To entitle him to a verdict, the plaintiff was bound to give preponderating evidence,—evidence, not irresistibly, but fairly and reasonably, leading to the conclusion that the defendants had failed in the performance of their contract.] It is submitted that there was such evidence here. [*Jervis*, C. J. I think not. *Williams*, J. Was there a case to call upon the company for a defence? You *must* admit that a delivery of the portmanteau at the Bristol and Exeter railway would be a performance of the defendants' contract. If so, what evidence is there that it was not so delivered?] It was not seen after the truck in which it was placed got upon the Bristol and Exeter railway. [*Williams*, J. It is manifest that the plaintiff thought it was there, though he did not actually see it.] No doubt he then thought it was there. But there was abundant evidence to go to a jury, that it was gone before it reached the point of delivery. And, before they disturb the finding of the judge, the court must be

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(a) Cited in *Willoughby*, App., *Horridge*, Resp., *antè*, Vol. XII, p. 742

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clearly satisfied that there was *no* evidence to warrant it. It is said that there was no undertaking on the part of the company to carry the portmanteau beyond the dividing line between the two railways. [*Cresswell, J.* Assume that there was a contract to carry it to the platform from which the Torquay train started.] Further than that,—to deliver it into the custody of the person whose duty it was to place it in the Torquay luggage-van; as, in *Richards v. The London, Brighton, and South Coast Railway Company*, to the passenger's carriage.

Phipson, in reply, was stopped by the court.

JERVIS, C. J. I am of opinion that the decision of the judge of the county-court in this case was wrong, and ought to be reversed. The question is, whether there is a case to go to the jury,—that is, was there a case in which the evidence preponderated in favour of the plaintiff? I think there was not. Assuming that it was part of the contract entered into by the Midland Railway Company to deliver the portmanteau either to the plaintiff himself at the terminus of their railway, or at the platform of the Bristol and Exeter railway,—have they performed that contract? The plaintiff insists that they have not; because, on his arrival at Bristol, he saw a porter of the defendants place his portmanteau on a truck with other luggage for the purpose of taking it across to the station of the Bristol and Exeter railway, and that he afterwards saw the porter with the truck enter the Bristol and Exeter station, pass down an incline from the arrival platform, cross the lines, and ascend an incline to the departure platform of the last-named railway, but saw no more of his portmanteau. Under these circumstances, the question is, was the portmanteau lost or stolen whilst in the custody of the

Midland Railway Company? If it was, the defendants have *not* performed their contract. On the other hand, if it was lost or stolen whilst in the custody of the Bristol and Exeter Railway Company, the defendants *have* performed their contract. Now, the evidence set out in the case is manifestly as consistent with the one view as the other. It is quite clear that the plaintiff thought the portmanteau was on the truck when he saw it pass from the one railway to the other, or he would have made more particular inquiry after it. It being equally probable that the loss occurred on the Bristol and Exeter railway, as that it took place on the Midland railway, and the onus of shewing a breach of the contract resting upon the plaintiff, I think he has failed to shew that he was entitled to recover, and consequently that a judgment of nonsuit ought to be entered.

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CRESSWELL, J. I am of the same opinion. The case falls precisely within the principle stated by Coleridge, J., in *Gilbert v. Dale*. The plaintiff was bound to give some evidence of the non-performance of the defendants' contract. It appears that the portmanteau was given to one of the company's porters on the platform of the Midland railway, to be forwarded by the Bristol and Exeter railway to Torquay; and that it never reached its destination. There was no evidence to shew what became of it,—nothing whatever to shew where the fault lay. The judge of the county-court was clearly wrong in point of law, in determining that there was evidence of non-performance of their contract on the part of the Midland Railway Company.

WILLIAMS, J. I am of the same opinion. It is clear, upon the facts stated, that it was assumed on all hands that a delivery of the plaintiff's portmanteau at the Bristol and Exeter railway would have been a sufficient

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delivery, if accomplished. It is also clear that the onus of shewing a non-delivery pursuant to the contract, lay upon the plaintiff. There was, however, no evidence at all of a failure to deliver at the Bristol and Exeter railway. There was no case, therefore, for the consideration of either judge or jury.

CROWDER, J. I am of the same opinion. The onus of proof clearly lay on the plaintiff. He was bound to give some evidence of the non-delivery of the portmanteau in pursuance of the defendants' contract. Assuming that a delivery to the Bristol and Exeter railway would have been enough, I do not find in the case any evidence of non-delivery there. It is said that the plaintiff's statement that he did not *see* the portmanteau after it was placed upon the truck on the platform of the Midland railway, was *some evidence* that it never reached the adjoining railway. That clearly amounted to nothing. Where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case. This doctrine was acted upon in a recent case from the Western circuit, *Doe d. Welsh v. Langfield*, 16 M. & W. 497, where it was ruled by the learned judge at the trial, that, if the evidence offered to prove a given fact is equally consistent with either view, it amounts to no evidence at all. This is exactly a case of that sort.

Judgment of nonsuit. (a)

(a) The plaintiff had already brought an action against the Bristol and Exeter Railway Company, and failed, for the same reason.

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BAYNTUN v. SATCHELL and Wife.

Jan. 12.

THIS was an action upon an account stated. The indorsement on the writ of summons was as follows:—
 “The following are the particulars of the plaintiff’s claim,—500*l.* for principal money due upon a warrant of attorney executed by the defendant Edward Satchell’s wife (before her marriage with him), bearing date the 20th of February, 1855: Interest thereon at the rate of 5*l.* per cent. per annum from the said 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek to recover the same sum of 500*l.* upon an account stated between the plaintiff and the said Edward Satchell’s wife before her marriage.”

On the 1st instant an order was made by Cresswell, J., for the plaintiff’s attorney to deliver to the defendants’ attorney a further and better account, with dates and items, of the particulars of the plaintiff’s demand for which the action was brought, and for a stay of proceedings in the meantime.

In pursuance of the above order, the plaintiff delivered the following as and for a further and better particular,—

“1855. February 25th. Amount due to the plaintiff upon an account stated on this date between the plaintiff and the defendant Ellen Giles before her marriage, 500*l.*

“Above are the further and better particulars of the plaintiff’s demand in this action, delivered in pursuance of the order of The Hon. Mr. Justice Cresswell, dated this day. Dated, &c.”

On the 2nd of January, the plaintiff’s attorney was served with a summons to shew cause why he should not deliver to the defendants’ attorney a still further

account, with dates and items, of the particulars of the plaintiff’s demand, the following was delivered,—“1855. February 25th. Amount due to the plaintiff upon an account stated on this date between the plaintiff and the defendant E. G. before her marriage, 500*l.* Above are the further and better particulars of the plaintiff’s demand in this action, delivered in pursuance of the order of Cresswell, J.,” &c. :—

Held, no compliance with the order.

The indorsement on a writ of summons was as follows,—
 “The following are the particulars of the plaintiff’s claim,—500*l.* for principal money due upon a warrant of attorney executed by the defendant E. S.’s wife (before her marriage with him), bearing date the 20th of February, 1855. Interest thereon at the rate of 5*l.* per cent. per annum from the said 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek to recover the same sum of 500*l.* upon an account stated between the plaintiff and the said E. S.’s wife before her marriage.”

Upon a judge’s order for a further or better account, with dates and items, of the particulars of the plaintiff’s demand, the fol-

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and better account in writing with dates and items of the particulars of the plaintiff's demand, with costs.

This summons was heard before Crowder, J., who conceiving that the particulars delivered were not a compliance with the order of Cresswell, J., made the following order :—" Upon hearing the attorneys or agents on both sides, I do order, that, upon payment of 16s. 8d. costs by plaintiff to defendants' attorneys, the plaintiff's attorney or agent shall deliver to the defendants' attorney or agent a further and better account in writing, with items, under the order of Cresswell, J., of the particulars of the plaintiff's demand for which this action is brought ; and that, in the mean time, all further proceedings in this cause be stayed, the defendants, in the event of pleading, undertaking to plead issuably."

Byles, Serjt., now moved to set aside the last-mentioned order. As to the effect of a warrant of attorney given by a woman who afterwards marries, the authorities are conflicting. In an *Anonymous Case*, 1 Salk. 117, it was held that marriage revokes a warrant of attorney given *by* the wife *dum sola*, but does not revoke a warrant of attorney given *to* her. There is, however, another *Anonymous Case*, in 1 Show. 91, which is the other way. In this case, the plaintiff had signed judgment, but the judgment was set aside by order of Erle, J. [*Cresswell*, J. The amended particular is a mere repetition of the indorsement on the back of the writ, with the addition of the date. You say there is no account stated except the warrant of attorney?] Coupled with what passed at the time of signing the warrant of attorney. If the court think the particulars ought to be amended, it will be done.

JERVIS, C. J. The court simply refuses the rule.

Rule refused.

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THE RIBBLE NAVIGATION COMPANY v. HARGREAVES.

Jan. 16.

THIS was an action brought to recover from the defendant the amount of certain tolls, rates, and duties claimed to be due from and of right payable by the defendant to the plaintiffs, under and by virtue of "The Ribble Navigation Act, 1853," for and in respect of certain coals carried and conveyed in and upon the river Ribble.

The defendant pleaded never indebted.

At the trial, before Crowder, J., at the Lancaster Summer Assizes, 1854, a verdict was found for the plaintiffs, for 58*l.* 5*s.* 2*d.*, subject to leave to move to enter a nonsuit; and afterwards, by leave of the court, it was agreed that the following case should be stated for the opinion of the court:—

The plaintiffs are a body corporate who were re-incorporated by the "Ribble Navigation Act, 1853," which forms part of this case (they having been previously incorporated by stat. 1 Vict. c. viii, which was repealed by the more recent act.)

The defendant is the owner of certain collieries at Coppull, in Lancashire, situate on the line of the North Union railway which runs to Preston, in the same county.

under a penalty; and that no vessel shall be cleared until the tolls are paid.

By the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, which is incorporated with the special act, s. 42, it is provided, that, if the goods are to be shipped, the rates or tolls shall be paid before the shipment; and by s. 45, the collector is empowered to distrain goods on board any vessel within the limits of the harbour, or any other goods on the premises of the undertakers, belonging to the person liable to pay such rates: and the interpretation clause, s. 3, provides that the word "owner," when used in relation to goods, shall include "any consignor, consignee, *shipper*, or agent for sale or custody of such goods, as well as the owner thereof."—

Held, that one who delivers goods on board a vessel provided by the purchaser, is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st section of the special act.

By the 71st section of the Ribble Navigation Act, 16 & 17 Vict. c. clxx, certain tolls are imposed in respect of goods "carried or conveyed in or upon the river Ribble," for every time of passing "the Ribble Sea Line," and "the Ribble Inner Line," respectively; and, by other clauses, a tonnage toll is also imposed on "vessels navigating the river Ribble," and a toll for "the wharfage of goods landed, loaded, or placed in or upon the company's wharfs or warehouses." Subsequent clauses provide that the master of every vessel shall produce bills of lading,

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The coals in question were sent from the defendant's collieries at various periods from November, 1853, to May, 1854, inclusive. They were put into the defendant's waggons, by his workmen, at his collieries, and thence sent by them in the said waggons along the North Union railway to Preston, and thence along a branch railway which joins the North Union railway, to the Victoria Quays, adjoining the river Ribble, and being within Preston. They were then tipped by the defendant's men out of the said waggons into vessels, and were afterwards carried in those vessels down the river Ribble past the "Ribble Sea Line" and the "Ribble Inner Line" mentioned in the said act of 1853, to various ports and places beyond the mouth of the said river.

The vessels were not engaged by the defendant. The coals in question were sold to merchants who provided the vessels into which the coals were delivered, as already mentioned. After the delivery, the defendant had nothing to do with them.

The branch railway was made under the authority of the statute 8 & 9 Vict. c. cxvi. (which formed part of the case). The Victoria Quays belong to the municipal corporation of Preston. Tolls are payable by virtue of the last-mentioned act, in respect of the use of the said branch railway and of the said quays; to the plaintiffs and the North Union Railway Company; those in respect of the branch railway for their own use, and those in respect of the quays for the use of the municipal corporation of Preston, whose collectors the plaintiffs and the North Union Railway Company are. These tolls were paid by the defendant in respect of all the coals in question.

The quays are within the limits of "the Ribble Navigation Act 1853."

A plan shewing the river Ribble, the Victoria Quays

and the said two lines called the "Ribble Sea Line," and the "Ribble Inner Line," and a canal called the Leeds and Liverpool Canal and Douglas Navigation which is a navigable canal communicating through the River Douglas with the Ribble), likewise formed part of this case.

It was not disputed, that, up to and at the moment of tipping the coals into the vessels, such coals were the defendant's property. The defendant sent them in pursuance of orders of a similar nature to the following:—

"Dear sir,—You will oblige me by loading the Volusia with a cargo of coals. Yours &c.

"Mich. M'Mahon.

"James Hargreaves, Esq., Preston.

"P.S. The freight is 6s. per ton from Preston."

The freight was payable in all cases by the purchasers of the coals on passing the branch railway. The defendant's servants gave to the servants of the plaintiffs and of the North Union Railway Company tickets or memoranda in the following form:—

"Coppull Collieries

"January 31, 1854.

"From John Hargreaves, Junr.

"DECLARATION OF TONNAGE.	T.	C.	Q.
20 waggons of coal, No. 187, 181, 10, 59, 134, 118, 77, 185, 146, 24, 46, 69, 98, 114, 62, 149, 103, 97, 182, 154	80		
Do. of slack			
Do. of mixture			
Do. of copperas stone			
Do. of coke			
"Per North Union Railway			
"To Mary Ann, Ribble			
"W. Brown."			

The defendant was to be paid, and was paid, for the coals, at a certain sum per ton delivered on board the vessels which were to carry them, and by which they

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were carried as aforesaid. The expense of conveying the coals to the quays, and of tipping them, was paid by the defendant, and included in the invoice price charge by him.

He delivered invoices similar to that on the opposite page.

The tolls claimed, are, the river or tonnage duties, which by the Ribble Navigation Act, 1853, the plaintiffs are impowered to demand, levy, take, receive, and recover, for coals carried or conveyed in and upon the said river Ribble.

It is admitted that the sum of 58*l.* 5*s.* 2*d.* is due to the plaintiffs for the said river or tonnage duties in respect of the said coals so carried and conveyed down the said river as aforesaid. The question is, whether the defendant is liable to pay the same.

The court was to draw all inferences that a jury would be warranted in drawing.

If the court should be of opinion that the defendant is liable, then the verdict to stand: if otherwise, a judgment of nonsuit to be entered.

Atherton, for the plaintiffs. (a) The question in this case, is, not whether the tolls claimed are payable, but whether the defendant is the person liable to pay them. This will depend upon a few clauses in the Ribble Navigation Act, 1853, coupled with some of the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated with the former act (by s.

(a) The point marked for argument on the part of the plaintiffs, was as follows:—

“The plaintiffs contend that the defendant is liable to them for the river or tonnage duties claimed by them by virtue of the ‘Ribble Navigation Act.

1853,’ (16 & 17 Vict. c. clxx), s. 71, coupled with the provisions of the ‘Harbours, Docks, and Piers Clauses Act, 1847’ (10 & 11 Vict. c. 27); particularly, the sections from 33 to 45, both inclusive, coupled with the interpretation clause.”

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RIBBLE	Ribble Navigation Act, 1853 (16 & 17 Vict. c. clxx),
NAVIGATION	some former acts incorporating the company, and
COMPANY	enabling them to receive certain tolls, were referred to,
v.	and repealed; and by the new act three descriptions of
HARGREAVES.	tolls are imposed,—one, by s. 68, on vessels navigating
	the river Ribble,—another, by s. 77, for the wharfrage
	of goods landed, loaded, or placed in or upon the com-
	pany's wharfs or warehouses,—and a third, by s. 71, on
	goods carried on the Ribble. The 68th section enacts
Section 68 of the local act. Tolls on vessels.	“ that there shall be paid and payable to the said com- pany hereby incorporated, or their collector to be from time to time appointed, from the master or commander or owner of every ship, barge, boat, lighter, or other vessel or craft navigating the said river Ribble, such tolls, rates, or duties as the said company hereby incorporated, or the directors thereof, shall from time to time appoint, not exceeding the rates and duties following,—that is to say, ‘ For every vessel from any port or place in the united kingdom or the Isle of Man, of the burden of 10 tons or upwards, passing an imaginary line drawn from and commencing at a place on the North side of the river Ribble, in the township of Lytham, called Cross Slack, and continuing thence South to a point where the same would meet the Southern line of the limits of deviation shewn on the plan deposited for the purposes of this act, if extended in a straight line, and continuing from thence along such extended line of limits of deviation, and following the line of such limits of deviation, as far as a point direct North of the boundary between the townships of North Meols and Hesketh and Beconsall, called the Hundred End, and continuing thence to and ending at Hundred End afore- said, and which said line is called the Ribble Sea Line, the sum of 4 <i>d.</i> for each and every ton of the burden of such vessel.’ ‘ For every vessel from any such port or

place as aforesaid of the burden of 10 tons or upwards passing an imaginary line drawn from the boundary between the townships of Little Hoole and Much Hoole, to the point marked C. on the plans deposited for the purposes of this act, and extending from thence along the line of the proposed wall shewn on those plans, to the low-water channel of the river Ribble, and proceeding thence northwards to and terminating at a place marked on those plans with the letter Z., being a place situate at Naze Point, in the township of Freckleton, and which said line is called the Ribble Inner Line, a sum not exceeding 6*d.* for every ton of the burden of each vessel :’ ‘For every vessel of the burden of 10 tons or upwards, from any such port or place as aforesaid, passing both the said imaginary lines, the said sums of *d.* and 6*d.* respectively as hereinbefore mentioned, for every ton of the burden of such vessel :’ ‘For every vessel from any other port or place navigating the said river Ribble, and being of the burden of 10 tons or upwards, passing the said Ribble Sea Line, the sum of *d.* for each and every ton of the burden of such vessel ; and, if such vessel shall also pass the said Ribble Inner Line, the further sum of 9*d.* for every ton of the burden of such vessel :’ ‘And for every vessel, laden in whole or in part, of the burden of 10 tons or upwards, which shall navigate the said river for the conveyance of goods or passengers along or across the same, and shall not pass either of the said imaginary lines (except the same be used only for the loading or unloading of any vessel which shall have paid in respect of the passing with such loading the above-mentioned tolls, rates, or duties, or some of them), the sum of 2*d.* for each and every ton of the burden of such vessel for each and every trip which such vessel so navigating, and not passing any of the said imaginary lines, shall make, the going and returning thereof respectively laden in whole or in part being

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reckoned separate trips :’ Provided always, that every vessel which shall come from any port or place in the united kingdom or the Isle of Man, and which shall clear outwards for any port or place not being in the united kingdom or the Isle of Man, shall be chargeable with the same toll or tolls as if such vessel had arrived from some port or place not being in the united kingdom or the Isle of Man: Provided also, that every vessel passing the said lines or either of them respectively, and paying the said toll or tolls as aforesaid, shall be entitled to re-pass once the said line or lines in respect of which such toll or tolls has or have been paid, without payment of any toll in respect of such re-passage.” The 77th section enacts “that it shall be lawful for the said company hereby incorporated, or their collector, in addition to the before-mentioned rates and tolls, from time to time and at all times hereafter during the estate, term, and interest of the said company hereby incorporated therein, to demand, receive, and recover, for the wharfage of all articles, matters, and things loaded or placed in or upon any of the wharfs, quays, yards, landing-places, or warehouses which now are held in lease by the said company hereby incorporated, or which shall be made or constructed or leased under the powers of this act, the wharfage rates and tolls following, that is to say (amongst others), For every ton of coals, coal-slack, culm, lime-stone, stone, and iron-ore, which shall be landed, loaded, or placed in, from, or upon the said wharfs, or any of them, any sum not exceeding the sum of 1*d.* per ton, and so in proportion for any less quantity than a ton: And, in case the said articles, or any of them, shall be left and remain in and upon any of the wharfs or warehouses which now are held in lease, or which shall be made or constructed or leased under the authority of this act, over and above or beyond the space of twenty-four hours, then the owner or owners of such

articles shall pay to the said Ribble Navigation Company hereby incorporated the further sum of 3*d.* per ton for the wharfage, and 1*s.* per ton for the warehousing thereof, and the sum of 1*s.* respectively per ton for every week after the first week such articles shall remain upon the said wharfs or warehouses after the expiration of the said first-mentioned week, and so after that proportion for any less period than a week." There can be no doubt as to the party by whom those duties are to be paid. [*Cresswell, J.* The legislature seem to have ascertained the party to be charged upon this principle,—the ship-owner who uses the navigation shall pay for such user, and the owner of the goods that are landed or warehoused shall pay for the use of the wharf or the warehouse.] Here, the defendant is the owner of the goods, and therefore, upon that principle, he is the person to pay these tolls. It is not denied that the vessel and the cargo had passed both the Inner Line and the Sea Line; consequently, the events had occurred to render the toll due from somebody. The 71st section enacts, "that, in addition to the before-mentioned rates and tolls, there shall be paid and payable to the said company hereby incorporated, or their collector, to be from time to time appointed, and the said company hereby incorporated, or their collector, are hereby empowered to demand, levy, take, receive, and recover, the several river or tonnage duties following, that is to say (amongst others), For all coal, coke, &c., carried or conveyed in and upon the said river Ribble, for every time of passing the said Ribble Sea Line, per ton, not exceeding 2*d.*, and so in proportion for a less quantity than a ton; and, for every time of passing the said Ribble Inner Line, per ton, not exceeding 3*d.*, and so in proportion for a less quantity than a ton." In order to provide means to enable the collector to ascertain what goods are carried, whose property they are, and what

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Toll on goods.

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 RIBBLE preventing frauds or impositions, the master of every
 NAVIGATION ship or vessel navigating the said river Ribble shall
 COMPANY upon demand made for that purpose by the collector of
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 Section 82. lading or manifest of the cargo in such ship or vessel;
 and, in case any master of any ship or vessel shall refuse
 to do so, he shall for every such offence be liable to a
 Section 90. penalty not exceeding 10*l*." The 90th section shews
 that the tolls are to be paid before the vessel leaves the
 limits of the harbour: it enacts "that it shall be lawful
 for any collector, comptroller, surveyor, or other officer
 of the customs acting from time to time in accordance
 with the orders of the commissioners of Her Majesty's
 customs, to refuse to take any report, inward or outward,
 or to grant any cocquet, transire, or other document,
 to the master, owner, agent, or consignee of any ship,
 vessel, or craft entering the said river, until such master,
 owner, agent, or consignee, shall have paid to the person
 authorised to receive the same, the said tolls, rates, or
 dues which the said company hereby incorporated are
 hereby authorised to demand and take from the master,
 owner, agent, or consignee, of any such ship, vessel, or
 craft entering the said river." The tolls, therefore, it is
 submitted, are due in point of law before the goods are
 actually put on board the vessel. If so, the defendant
 was then the owner of the coal in question, and the plain-
 tiffs are entitled to recover against him in this action.

Incorporation
 of the 10 & 11
 Vict. c. 27.

The 60th section enacts "that the Harbours, Docks,
 and Piers Clauses Act, 1847, except the sections of that
 act with respect to the construction of works for the
 accommodation of the officers of the customs, and except
 such of the sections of that act with respect to the rates
 to be taken by the undertakers as are numbered respec-
 tively 25 and 26, shall be incorporated with this act."

The 3rd section (the interpretation clause) of the

10 & 11 Vict. c. 27, gives the following definition of "owner,"—"The word 'owner,' when used in relation to goods, shall be understood to include any consignor, consignee, shipper, or agent for sale or custody of such goods, as well as the owner thereof." [*Cresswell, J.* One can very well understand why, as between him and the company, the consignor should be considered as the owner of goods shipped for abroad.] The consignee of the coals in question,—which were shipped for Ireland,—would be as inaccessible for the purpose of obtaining the tolls from him, as if he were at Calcutta. The clauses which relate to the collection and recovery of rates, in the general act, are, the 34th to the 48th. The 34th section enacts that "the collector of rates may, either alone or with any other persons, enter into any vessel within the limits of the harbour, dock, or pier, in order to ascertain the rates payable in respect of such vessel, or of any goods therein." By s. 35, a penalty is imposed on the master for neglecting to report the arrival within the limits of the harbour, &c., of any vessel liable to rates; by s. 36, he is to produce the certificate of registry of the vessel; by s. 37, to give accounts of goods intended to be unshipped within the limits of the harbour, &c.; and by s. 38, a penalty is imposed upon him for omitting to give such account, or for giving a false account. The 39th section enacts, that, "before any person shall *ship* any goods on board of any vessel lying within the limits of the harbour, &c., he shall give to the collector of rates a true account, signed by him, of the kinds, quantities, and weights of such goods; and *every person who shall ship* any goods in any such vessel without having given such accounts, or who shall give or sign a false account of such goods, shall for every such offence be liable to a penalty not exceeding 10*l.*" The 40th section enacts, that, "if any difference arise between the collector of the rates and

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the master of any vessel, or the owner of any goods, concerning the weight or quantities of the goods in respect of which any rates are payable, such collector may cause all such goods to be weighed or measured, and, if necessary, may detain the vessel containing such goods until they have been weighed or measured." The 41st section provides for the expenses of weighing or measuring goods. The 42nd section,—which is a most material one,—enacts that "the rates payable to the undertakers in respect of any goods *shipped* or unshipped within the limits of the harbour, &c., shall be paid as follows, that is to say,—if such goods are *to be shipped*, they shall be paid *before shipment*; or, if such goods are to be unshipped, they shall be paid before the removal of the goods from the premises of the undertakers, and before the expiration of two months next after they were unshipped." The rates in question being rates payable to the company in respect of goods *to be shipped*, for the purpose of determining the time of payment, regard must be had to the time immediately preceding the shipment: and it is highly expedient that it should be so; otherwise, the remedy would be futile. [*Jervis, C. J.* The vessel does not get her papers until the dues are paid: 16 & 17 Vict. c. clxx, s. 90. *Cresswell, J.* The 44th section of the general act authorises the seizure of the *ship* if the tonnage dues are not paid. But there is nothing to authorise the company to stop the shipment of goods.] The 43rd section enacts, that, "if the master of any vessel or the owner of any goods evade the payment of the rates payable to the undertakers in respect of such vessel or goods, or any part thereof, he shall pay to them three times the amount of the rates of which he shall so have evaded the payment, and the same shall be recovered from such master or owner respectively in the same manner as penalties imposed by this act are directed to be recovered, or by

action in any court of competent jurisdiction." The person to whom the goods are to be sent is one as to whom the remedy by action would be perfectly idle. [*Jervis*, C. J. Suppose the defendant paid the dues; the coals immediately on their shipment cease to be his: and suppose, from some unforeseen cause, coals should suddenly acquire such a value as to induce the consignee into whose ship they have been put, to re-land and sell them,—the vessel not having passed either line, what would be the consequence?] That probably would be a case of failure of consideration. [*Jervis*, C. J. Many tolls rest upon intention: passing tolls, for instance. Where a vessel is going away intending to pass the Sea Line, the toll would be payable. Is it claimed here for the intended voyage, or for the back voyage?] They clear for the intended voyage. The expression in the 68th section of the local act, imposing the toll, is, "for every vessel, &c., *passing* the line," &c., and yet there can be no doubt that the toll is payable before the vessel leaves the quay: the collection would be impracticable if it could only take place at or after the actual passing of the line; the remedy by distress given by s. 45 of the general act would in that case not be available. That section enacts, that, "if default be made in the payment of the rates payable in respect of any such goods [meaning the goods mentioned in s. 42.], the collector of rates may distrain or arrest, of his own authority, such goods, and for that purpose may enter any vessel within the limits of the harbour, dock, or pier in which the goods may be, with such assistance as he shall deem necessary: or, if the said goods have been removed without payment of such rates, he may distrain or arrest any other goods within the limits of the harbour, dock, or pier, or the premises of the undertakers, belonging to the person liable to pay such rates, and may sell the goods so distrained or arrested, and out of the proceeds

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of such sale pay the rates due to the undertakers, rendering the overplus, if any, to the owner of such goods, on demand: or the undertakers may recover such rates by action in any court having competent jurisdiction," &c. And the 43rd section imposes a penalty on the master of any vessel or the owner of any goods who shall evade payment of the rates. [*Williams, J.* What construction do you put upon the word "passing?"] The toll, it is submitted is imposed in respect of the passing of the line, but due and recoverable before the time for passing has arrived: in other words, it is due when the goods are intended by the owner to pass the line. [*Jervis, C. J.* Is the toll imposed for passing out as well as in?] Either way: but a vessel paying toll on coming in, or on going out, may re-pass out or in respectively without further payment. That is expressly provided for by the latter part of the 68th section of the local act. [*Cresswell J.* The act does not seem to contemplate a seizure of goods about to be shipped, whilst on the quay.] Power to distrain goods on the ship, does not preclude a distress upon the quay. [*Cresswell, J.* It clearly does not give it. You might be distraining the goods of A. for tolls payable by B. Here, the coals when shipped became the property of the vendee.] There is nothing more unreasonable in that than there is in the right which the law gives to a landlord to distrain chattels of a stranger found upon the premises in respect of which rent is due. [*Cresswell, J.* There is no analogy whatever between the two cases. The right here given, is, to seize goods belonging to the person liable for the tolls. The owner of the goods is the person liable.] The owner of the goods must either be the person who ships them or the person for whom they are shipped. The remedy given by the 45th section of the general act could not be enforced against the person for whom the goods are shipped, who generally would be a person residing at a great distance from the harbour.

[*Cresswell, J.* The 41st section seems to contemplate an account of the weight or quantity of the goods to be shipped, to be given, not by the person bringing them to the ship's side, but *by the owner of the goods.*] The person who puts the goods on board is the "shipper" within s. 39, and the person who is bound under a penalty to furnish an account of the goods intended to be shipped. The whole scope of the act evidently contemplates that the toll is to be taken from some one before the person whose property they are to be when shipped becomes the owner. In this case, the toll was payable at a time when the defendant had not ceased to be the owner of the coals. The remedy by action would be unavailing and absurd, if a contrary construction be put upon the acts. In a case of *The Master Pilots and Seamen of Newcastle-upon-Tyne v. Hammond*, 4 Exch. 285, a construction was put upon the word "owners," which very much advances the argument in this case. A charter of James 2 granted to the master pilots and seamen of Newcastle-upon-Tyne certain dues, to be paid "by all persons being *owners* of any goods which should be brought in any ship from beyond the seas into the river Tyne," in manner following, "that is to say, aliens and strangers born, and other such persons who, with their ships, should arrive within the said port, and not belong to the same, before they depart with their said ships from the said port, should pay the duties aforesaid, and every free merchant and other inhabitant of Newcastle, arriving with their said ships within the river Tyne, should pay the duties aforesaid within ten days after the landing of the goods as aforesaid, upon lawful demand." The duties had been always paid by the importer. In an action to recover these dues, the court of Exchequer held, that a person who *gratuitously* landed, entered, and warehoused goods for the owners, who resided in London, was an "owner" within the

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meaning of the charter, and liable to the dues. [*Cresswell*, J. All that that case decides, is, that, though the defendant landed, entered, and warehoused the goods gratuitously, he was in the same position as if he had acted in the ordinary capacity of agent. It is not the mere shipment in this case that entitles the plaintiffs to the toll claimed. It is due in respect of goods "carried or conveyed in and upon the river Ribble."]

Manisty (with whom was *Hugh Hill*), contra. A great deal of the difficulty here arises from the circumstance of the general act for the regulation of harbours, docks, and piers, having been incorporated into an act of a totally different character. The defendant here has contracted with a merchant, for a certain price, to put coals on a board a certain ship. He is not, in the ordinary sense of the word, the "shipper" of the coals. He does not know where the coals are going to, or what dues may be payable in respect of the use of the navigation. He has no means of knowing whether they will pass one or both of the lines referred to. The tolls in question are imposed by the 71st section of the local act. That section charges the tolls upon all goods "carried or conveyed in and upon the said river Ribble," but does not say by whom they are to be paid. By a subsequent section (79), craneage rates are imposed. Who is to pay? Why, the person who carries or conveys the goods, or who uses the company's cranes. Assuming that the 42nd section of the general act applies to all these tolls, the meaning of it obviously is, that the person liable to pay them shall be compellable to pay them before the goods are shipped. There is no difficulty in saying that the person putting these coals on board the *Volusia* is the "owner" within the acts, and the person chargeable. It was never intended by the 42nd section to shift the liability from one person to another. It

imposes no new liability upon any one : it merely ascertains the time when the toll is payable,—to facilitate the collector's duties. Suppose, instead of being shipped at Victoria Quay, these coals came down the Leeds and Liverpool Canal, and then used the Ribble navigation, who would have to pay the tolls,—the owner of the coals at the time they left the colliery? or the owner at the time the navigation was used? Clearly the latter : and that shews the true meaning of the 42nd section. All convenience and justice concur in this view. The “shipper” is the person who brings the ship to the quay for the purpose of receiving the coals : all the remedies for recovering the tolls exist against him, which exist in any other case. The 45th section gives the collector power to enter the ship to distrain for the rates. If the power of distress could be exercised before the goods were shipped, for what is the distress to be made? The goods are on the quay : the *owner* alone knows their destination : for what, then, are they to be distrained? In the same section, mention is made of “the person liable :” and power is given to distrain any other goods of the same person within the limits of the harbour. [*Williams, J.* When do you say that the power of distress first attaches?] Not until the goods are put on board,—that is, for the toll to become due in respect of the passage of the goods themselves. That, however, is immaterial for the purpose of this argument. Then, another question arises,—for how much are the company to distrain? Are they to distrain ten tons put on board, in respect of the toll upon eighty or a hundred tons which are supposed to be coming from the colliery? or, would the distress be for toll for passing the Inner Line or the Sea Line? It might be that the coals were to be landed at Lytham, which is between the two lines. The 43rd section of the general act imposes a penalty for the evasion of payment of the tolls. How can a man be

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said to evade a toll which he has no means of knowing will ever become due? The "owner of the goods" is expressly named in the 43rd and 45th sections as the person who is to pay the tolls: and the 42nd section in no degree changes the liability; it merely fixes the period of payment by the person liable to pay. Then, are the tolls payable in respect of the passing the Inner Line or the Sea Line, or both, at all affected by the 42nd section of the general act? That act, at the time of its passing, was intended to apply to harbours, docks, and piers, and to nothing else: and the interpretation clause, s. 3, expressly enacts that "the following words and expressions, in both this and the special act (a), and any act incorporated therewith, shall have the meanings hereby assigned to them, *unless there be something in the subject or context repugnant to such construction.*" The rates or tolls in that act have no reference or affinity to the dues here claimed, which are applicable exclusively to the use of a navigation. The interpretation clause, therefore, affords no key to the construction of the special act. The "owner," in those clauses imposing the toll, means, it is said, the person who was owner immediately before the shipment of the goods. The Victoria Quay, whence these coals were tipped, is not the property of the company: it belongs to the corporation of Preston. The waggon, at the time of tipping, was not upon the company's premises: and it is found as a fact in the case, that the dues for the use of the quay and branch railway have been paid. Supposing the company's right be left in doubt, the court will act upon the principle adopted in *Barrett v. The Stockton and Darlington Railway Company*, 2 Scott, N. R. 337, 2 M.

(a) The expression "the special act," is by s. 2 defined, "any act which shall be hereafter passed authorising the construction or improving of any harbour, dock, or pier, and with which this act shall be incorporated."

& G. 134 (a), that, in railway acts, the clauses imposing tolls or duties, if there be any ambiguity therein, are to be construed most strongly against the company, and in favour of the public. So far from its being clear that this defendant is liable for the tolls in question, it is submitted, that, apart from the 42nd section of the general act, his non-ability would be manifest: and, for the reasons already given, it is submitted that that section in reality makes no difference.

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Atherton, in reply. It is conceded on the other side, that these dues are to be paid by the shipper. [*Cresswell*, J. No. It is conceded that they are to be paid by the person who had the goods carried or conveyed in and upon the river Ribble.] The person who puts the goods on board is for the purposes of this act the shipper. He clearly has all the information requisite to enable him to arrive at the amount of the dues to be paid. And he alone possesses this information; for, until the goods are shipped and despatched to him, the consignee has no means of knowing whether his order has been accepted and will be complied with. If the consignee is the shipper, at what moment of time can he be said to be in the act of shipping? It is admitted that he is not the owner of the coals until they are put on board the ship: and then the act of shipping is past. The defendant alone is the person who could at any time be said to ship the coals: and, that he is benefited by the navigation, is clear; for, but for the company's expenditure, no access could have been had to the place of loading. He also knows the quantity to be loaded. [*Crowder*, J. But possibly not the destination.] He knows the person he contracts with, and he knows the

(a) Affirmed on error in the Exchequer Chamber, 3 Scott, N. R. 803, 3 M. & G. 956, and afterwards in the House of Lords, 8 Scott, N. R. 641, 7 M. & G. 870.

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vessel on board of which the coals are to be shipped: it can be no very violent presumption, therefore, to conclude that he also knows their destination. It would be hard to impose upon the consignee the penalty given by s. 39 of the general act. It lies, doubtless, on the plaintiffs to make out their case. But the question here is, not whether a toll or impost is due: that is admitted: but the question is, whether the defendant or some unknown and inaccessible consignee is the party who is to pay them. In dealing with such a question, the court will construe the language of these acts of parliament precisely as they would any others.

JERVIS, C. J. I am of opinion that our judgment in this case must be in favour of the defendant. It is not necessary for the court upon this occasion specifically to point out how and under what circumstances particular persons may become liable to the tolls or duties in question. It is enough for us to say that we do not see any words in either of the acts to which our attention has been called, to make the present defendant liable. Tolls are given to the company by the special act, under three different heads,—on vessels navigating the river Ribble, by s. 68,—for the wharfage of goods landed, loaded, or placed in or upon the company's wharfs or warehouses by s. 77,—and on goods carried or conveyed in or upon the river Ribble, by s. 71. This latter section makes no mention of the particular person by whom the toll is to be paid: but I think it follows that those who derive benefit from the navigation are the parties by whom the toll is to be paid. Some expressions, however, in the general act are relied on by the plaintiffs as fixing the defendant. I think he is neither the "owner" nor the "shipper" of these coals, within the meaning of the 3rd section. He is not the owner, because by his contract his ownership is at an end the moment he delivers the

coals on board the ship provided by the buyer : and he is not the shipper ; the shipper is the consignee who has purchased the coals, and has provided the vessel for their transport. It is urged that the company will be left without remedy, or be put to much inconvenience in the recovery of these tolls, if the defendant is held not to be liable. Both acts, however, contain ample provisions to meet the difficulty. The special act, by s. 82, enacts, " that, for preventing frauds or impositions, the master of every ship or vessel navigating the said river Ribble shall, upon demand made for that purpose by the collector of rates, produce unto the collector of rates the bill of lading or manifest of the cargo in such ship or vessel ; and, in case any master of any ship or vessel shall refuse to do so, he shall for every such offence be liable to a penalty not exceeding 10*l*." And the 45th section of the general act gives a power of distress ; and the 48th section further provides that " the collector or other proper officer of Her Majesty's customs for the district within which the harbour, dock, or pier is situate, may, with the consent of the commissioners of Her Majesty's customs, refuse to receive any entry, or give any cocquet, discharge, or clearance, or to take any report inwards or outwards of any vessel liable to the payment of any of the rates imposed by the special act, until the master of such vessel produces to such collector or officer a certificate, under the hand of the collector of rates, that the rates payable in respect of such vessel, and any goods imported or exported by such vessel, have been paid, or, if there be any dispute as to the rates payable, until such collector or officer shall be satisfied that sufficient security has been given for the payment of such rates when ascertained, together with the expenses arising from the non-payment thereof." There is also a further remedy given by s. 45, by action. And that section, taken in conjunction with s. 42, is relied on

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to shew that the present defendant is liable. I must confess I entertain very considerable doubts whether that 42nd section has any application at all. The difficulty arises from the modern practice of incorporating into special and local acts some general sweeping enactments applicable to a class,—a practice which in many cases leads to serious inconvenience and embarrassment. The 42nd section enacts that “the rates payable to the undertakers in respect of any goods shipped or unshipped within the limits of the harbour, dock, or pier, shall be paid as follows, that is to say,—if such goods are to be shipped, they shall be paid before the shipment, or, if such goods are to be unshipped, they shall be paid before the removal of the goods from the premises of the undertakers, and before the expiration of two months next after they were unshipped.” But the toll in question is not a toll payable for “goods shipped,” but a toll for passing the lines of the navigation. I doubt whether the 42nd section applies at all: but, assuming that it does, it clearly does not alter the character of the person by whom the toll is to be paid. The toll is to be paid by the person benefited by the use of the navigation; but to be paid at a different time, viz. before the goods are shipped. When you look to the contrary case, of goods to be unshipped, it makes it plain. The toll on goods shipped is to be paid before the shipment, and to be paid by the person who will be the owner of them at the time they take the benefit of the navigation: goods unshipped are to be paid for by the person who brought them in, though at the time they may be the property of another person. It is only where the company resort to their remedy by action, that any difficulty arises. It is enough, however, to say that, I see nothing in the acts to render the present defendant liable: consequently, I think the defendant must have judgment.

CRESSWELL, J. I am of the same opinion : and I cannot help thinking, with my Lord, that the difficulty in this case has arisen from the practice of making general enactments in loose terms, which are to be incorporated in and applied to all special or local acts to be afterwards passed relating to the same or a similar subject matter. The toll in question is imposed by the special act in respect of goods carried or conveyed in or upon the river Ribble. If no goods are carried or conveyed in and upon the river Ribble, no toll is due. That act, therefore, clearly would not enable the company to claim the toll until the goods were carried upon their navigation. Then, the general act, as to the collection of rates, provides that certain things shall be done. It is said that the defendant has made default in payment of these rates. Let us see what the act says as to the remedy. Providing for the recovery of rates on goods, the 45th section enacts that the collector may distrain such goods, and for that purpose may enter any vessel within the limits of the harbour, &c., in which the goods may be, or he may distrain any other goods within the limits of the harbour or the premises of the undertakers, belonging to *the person liable to pay such rates*, or the undertakers may recover such rates by action. That does not afford us much information. The special act does not fix the person who sold the goods ; the goods not being his at the time they are carried, they cannot be said to have been carried for him. The remedy by action not being given against the seller, we must go back to the 42nd section of the special act, to see whether this defendant is liable to the rates in question. That section enacts that "the rates payable to the undertakers in respect of any goods shipped or unshipped within the limits of the harbour, dock, or pier, shall be paid as follows,—that is to say, if such goods are to be shipped, they shall be paid before the shipment, or, if such goods are to be unshipped, they

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shall be paid before the removal of the goods from the premises of the undertakers." Assuming that the 42nd section applies at all, it does not apply to this defendant. I fully participate in the doubts expressed by the Lord Chief Justice as to the applicability of that section to tolls for using the navigation of the river Ribble. Now, if the special act had given the company a rate or toll payable by persons using their navigation, and the 45th section of the general act superadds a remedy by distress or by action against the owner of the goods carried, what is there in the 42nd section to change the burthen? It merely says that the rates shall be paid before shipment of the goods, not saying by whom: it does not even say that they shall be paid by the owner. There is nothing in the acts to fix this defendant with the liability sought to be imposed upon him by this action.

WILLIAMS, J. I am entirely of the same opinion. The reason of the thing, and the analogy to be drawn from the other provisions in the local act as to the tonnage dues on ships and wharfage dues, irresistibly lead to the conclusion that the liability to pay the tolls in question is to follow the direct benefit which the owner of the goods derives from having them carried along the navigation. The question is, whether that impression is removed by any of the clauses in the general act. I cannot see anything in that act indicating an intention to throw the burthen on a person who would not have been liable to the tolls under the special act. The reasons given by my Lord and my Brother Cresswell satisfy me that Mr. Atherton's argument fails, and that the defendant is entitled to judgment.

CROWDER, J. I am of the same opinion. By the 71st section of the special act, the toll in respect of the carriage of goods along the river Ribble is imposed inferentially, though not in terms, upon the person for

whom they are carried: and it is but just that the party benefited by the use of the navigation should pay the tolls. But it is said that the general act points out the party who is to pay the toll; and s. 45 is relied on to shew that the defendant, who was the owner of the coals before their shipment, is the person upon whom the legislature intended to cast the burthen. Doubts have been expressed by my Lord and my Brother Cresswell, as to whether, by reason of its language, the 42nd section of the general act is applicable at all to this species of toll. Whether it is or is not applicable seems, to say the least of it, very doubtful. But, assuming that it does apply, reading all the provisions of the general act, from s. 34 to s. 45, I do not find any thing to justify the imposition of the toll upon the present defendant. He is not, according to my notion, the shipper. The shipper here is the person who has his ship ready to receive his coals which he has purchased of Mr. Hargreaves. Nor do I think any argument can be drawn from the interpretation clause, to shew that the "owner of the goods" means the person who puts them on board. I think, looking at those clauses of the general act, it was intended that the tolls should be pre-paid, but not that they should be paid by a person in the situation of this defendant. The strongest argument urged by Mr. Atherton was that arising out of the preponderance of convenience. But I do not appreciate the weight of that. Take the two remedies,—by distress of the goods, and stoppage of the vessel,—they would apply equally whether the vendor or the vendee was the person chargeable with the tolls. Upon the whole, I can see no reason for thinking, that, under the circumstances of this case the burthen of paying these tolls was intended to be imposed upon the defendant, and consequently he is entitled to our judgment.

Judgment for the defendant.

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It is no answer to an application for leave to deliver interrogatories to a defendant, under the 51st section of the Common Law Procedure Act, 1854, that the answers to the proposed interrogatories might tend to a forfeiture of the party's estate: the objection must be made to the particular questions, after the party has been sworn.

Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture.

CHESTER v. WORTLEY and COLE.

THIS was an action of ejectment for breaches of covenant in a lease granted by one John Lyne to one George Curnick, of certain premises the freehold whereof was in the plaintiff. The defendant Susannah Wortley defended as landlady for the whole of the premises. The defendant Cole as landlord defended for part of the premises, as assignee of an under-lease.

Upon affidavits stating the above facts, and also that the deponent believed that the defendant Susannah Wortley was nearly seventy years of age, and very deaf; that the deponent believed he should derive material benefit in this cause from the discovery he sought by interrogatories of the defendant Susannah Wortley; and that it might be necessary to produce at the trial the subscribing witnesses to the said lease, under-lease, and the respective assignments thereof, or some of them,

T. E. Chitty obtained a rule calling upon the defendants to shew cause why the plaintiff should not be at liberty to deliver to the defendant Susannah Wortley, or to her attorney, interrogatories in writing, and why the said defendant should not within ten days answer the questions in writing, by affidavit, to be sworn and filed in the office of the masters of this court, pursuant to the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125, s. 51,—notice of the rule to be given to the defendant Cole. He referred to *Mitford on Pleading*, 5th edit. 333, and *The Attorney-General v. The Corporation of London*, 2 M'N. & G. 247.

The interrogatories proposed to be administered were as follows :—

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“ 1. Was not a lease dated the 9th of September, 1824, or when, made by one John Lyne to one George Curnick, of or including the premises whereof in the present action you seek to defend the possession ?

“ 2. Were you not, at the commencement of this action, and, if yea, since when were you, the assignee of the estate, right, title, or interest of the said George Curnick, created by such lease, in respect of the premises whereof in the present action you seek to defend the possession ?

“ 3. Look at the paper now at your examination produced to you, marked A., and purporting to be a counterpart of a lease, and state whether or not the terms contained in that paper are the same, or substantially the same, as those contained in such lease as is in the first and second interrogatories referred to ?

“ 4. In case you have answered the first and second interrogatories in the negative, state whether or not you claim or derive any, and what, title, estate, or interest under or by virtue of such lease ?

“ 5. Is it not true that the plaintiff was, at the commencement of this suit, entitled to the reversion expectant on such lease, or how otherwise ?

“ 6. Was not the plaintiff, at the commencement of this suit, your landlord in respect of the premises whereof you defend the possession in this action ? And, if yea, since when was he such ?

“ 7. The plaintiff admitting that he has no right against you in respect of any rent payable before Michaelmas Day, 1853, have you not before that day, and, if yea, when, or during what period, paid or caused to be paid to him rent in respect of the premises whereof you defend the possession in this action ? And what caused you to make such payment or payments ?

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"8. Has not the plaintiff since the 17th of February, 1846, claimed to be entitled to be paid rent by you, or whom else, in respect of the premises? And, if yea, to what rent when payable did he make such claim, and when first did you know of such claim? And was such claim, if yea, by whom and when, resisted or repudiated?

"9. Have you ever, and, if yea, when, paid rent in respect of the premises to the plaintiff as agent or bailiff of any and what other party? If yea, what led you to suppose that he was such agent or bailiff to receive such payment or payments?

"10. Is not the plaintiff the freeholder of the premises in question, or how otherwise.

"11. When first, and from whom, did you acquire your right, title, or interest to or in the premises in question? And by what form of conveyance, if any, of what date, between whom, and conveying what interest in the premises to you?

"12. Have you ever, and, if yea, when, before Midsummer Day, 1853, or during what period before then, and to whom, paid rent in respect of the premises in question, or any and what part thereof? And state whether or not you made any and which such payments to such person or persons as being entitled to or claiming to be paid the same by virtue of his or their interest in the reversion expectant on the above-mentioned lease.

"13. Did you ever, and, if yea, when, or during what period, pay rent in respect of the premises in question to one Edward Austin, or any person or persons acting or professing to act on his behalf for the receipt of such rent? If yea, by virtue of what title did he claim such rent?

"14. Did you ever, and, if yea, when, or during what period, before Midsummer Day, 1853, and when

first, and when last before that day, pay rent to the plaintiff in respect of the premises? And in respect of what title, right, or interest, or claim of his, if any, did you make such payment or payments? If you made any such payment or payments to him as reversioner upon the term, if any, created by the above-mentioned lease, state so, and it will be a sufficient answer to the present interrogatory.

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“15. State whether or not have any, and, if yea, what, communications or transactions taken place between you and him during last year, in the course of which you have treated him as your landlord in respect of the premises in question; and whether or not you caused to be tendered (after the commencement of this action) to the plaintiff, as being your landlord of the said premises, the arrears of rent thereof due at Midsummer last, and payable under the said lease: if yea, by whom such tender was made.

“16. Look at the paper now at your examination produced to you, marked B., and purporting to be a form of receipt, and state whether or not any receipt or receipts in that form were given to you by the plaintiff for rent paid to him as above-mentioned.

“17. Was there, at the commencement of this suit, a ditch or drain, about 230 feet long, running along two sides of the premises adjoining those in question, occupied by Mr. George Wells?

“18. Was there not, at the commencement of this suit, an open cesspool or bog-hole at the Eastern corner of the premises in question, nearest to the chapel ground?

“19. Did that cesspool and ditch, or either of them, and which, or any part thereof, and, if yea, what part, belong to you?

“20. Do the premises whereof you defend possession

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of them, and which or any and what part thereof?
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"21. Have you or any such tenant or agent or person or persons under whom you claim, stating whom, ever, and when, and every time when, altered, enlarged, or narrowed, or heightened or lowered the bank of that ditch, or bridged or arched it over, or closed it, or any part of it, up, or done anything and what to it? State the particulars of your knowledge herein.

"22. When was the ditch or drain made, and by whom? And state whether or not by any person or persons claiming under the above-mentioned lease.

"23. What is the length fronting the Gipsy House Road of the premises the possession of which you defend in this action?

"24. What is the length of the South-Eastern side of the premises which runs at right angles with the Gipsy Road, and forms a continuation of the boundary line between Rose Cottage and garden and the chapel ground?

"25. Is there, was there, and, if yea, when last was there, a mound and hedge, or either of them, adjoining and running parallel with the cesspool and the ditch on the side of it, which is included by the premises claimed by you?

"26. Have you or your tenants been in the habit of using, or used, the ditch or drain in question?

"27. Are there or is there any drains or drain on your side of the premises, running into the ditch?

"28. Has the ditch been used by you or your tenants in common with the party occupying the land occupied by Mr. Wells as above-mentioned? And, if yea, when, how, and to what extent?

"29. Is the ground or soil lying beneath the ditch and cesspool in any and what way yours?

"30. Has the ditch and cesspool been used or enjoyed by you or your tenants as part of the land demised? If yea, when and during what period?"

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Byles, Serjt., on a subsequent day, shewed cause. There are three objections to this rule,—first, this is an action of ejectment for a forfeiture, and therefore a case in which discovery could not be had in a court of equity,—secondly, the proposed interrogatories lead to the exposure of the defendant's title, and therefore it is not a case for discovery,—thirdly, this is not a case in which the defendant could be examined personally as a witness.

The rule is founded upon the 51st section of the Common Law Procedure Act, 1854, which enacts, that, "in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the court or a judge may at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing, by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly." (a)

(a) The 52nd section enacts, that "the application for such order shall be made upon an affidavit of the party proposing to interrogate, or his attorney or agent, or, in the case of a

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1. The cases upon this subject are collected in Pollock's Common Law Procedure Act, 1854, where the result is thus stated at p. 45,—“Closely akin to the cases of penalty are those in which it has been held that a defendant need not answer where a forfeiture of his interest would be the consequence. Thus, where a legacy was given to the defendant, upon condition that she married with the consent of the trustees under the will, it was held that she was not bound to answer to a bill for a discovery of her marriage, since she could not do so without stating also that it was without consent: *Chauncey v. Tahourden*, 2 Atk. 392; *Lord Uzbridge v. Staveland*, 1 Ves. sen. 56; *Boteler v. Allington*, 3 Atk.

body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay: provided that, where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.”

case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just.”

And s. 53 enacts, that, “in

453. The forfeiture must, however, be of an interest, strictly so called, and the objection does not apply to the mere determination of an interest by force of limitation: Wigram on Discovery, § 134, *Lucas v. Evans*, 3 Atk. 260: see also *The Attorney-General v. Duplessis*, 2 Ves. sen. 286." In Phillipps on Evidence, 10th edit. Vol. II, p. 492, it is said: "A witness is privileged from answering a question the answering of which might subject him to a penalty or forfeiture of any kind. The declaratory statute, 46 G. 3, c. 37 (a), implies that a witness may legally refuse to answer a question which has a tendency to expose him to a penalty or forfeiture of any nature whatsoever. At the time of passing that act, when the general privileges of witnesses were much discussed, it was proposed to insert in the act a proviso, that no mortgagee, or bonâ fide purchaser, or possessor of an estate, should be compelled to answer any question, the answering of which might probably tend to defeat his title, or incur a forfeiture of his estate. This proviso was afterwards withdrawn. However, several of the judges who on that occasion were of opinion that the liability to a civil action or to a pecuniary charge ought not to exempt a witness from answering questions, yet considered the probability or danger of incurring a forfeiture of estate to be a legal ground of exemption. In courts of equity, it is an established principle, that a party is not bound to answer, so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest." The first answer, therefore, to this rule, is, that the answers to the proposed ques-

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(a) Which declares that a witness cannot legally refuse to answer a question relevant to the matter in issue (the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture

of any nature whatsoever), on the ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit."

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tious might expose the defendant to a forfeiture of her interest, and therefore it is not a matter as to which there could have been a discovery in equity at the time of the passing of the Common Law Procedure Act, 1854. It may also be doubted whether this provision applies at all to ejectment, in which there is neither declaration nor plea: *May v. Hawkins*, 11 Exch. 210. [*Cresswell*, J. The court of Exchequer, in a case of *Flitcroft v. Fletcher*, 26 Law Times, 227, held ejectment to be within the act; and granted interrogatories to make the plaintiff disclose his pedigree, as he would have been bound to state it upon a writ of right.] The consequences will be fearful, if that doctrine is to prevail. This, however, is not an ordinary ejectment; it is a case of forfeiture.

2. The second answer to this rule, is, that the plaintiff is seeking to compel the defendant, by disclosing her title, to furnish him with the means of attacking her. Upon this subject there are several authorities. In *Ivy v. Kekewick*, 2 Ves. jun. 679, the bill stated that the testator had after the execution of his will contracted for the purchase of an estate, which purchase was completed by his executor, Kekewick, who conveyed to his son, and that they are, or one of them is, in possession: that the plaintiff is heir ex parte maternâ, and that there is no heir ex parte paternâ. The defendant Kekewick by his answer claimed as heir ex parte paternâ. The plaintiff by the amended bill prayed that the defendant might set forth in what manner he is heir ex parte paternâ, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths, or burials of all the persons who should be therein named. But the Lord Chancellor said: "This is a fishing bill, to know how a man makes out his title as heir. He is to make it out: but he has no business to tell the plaintiff how he is to make it

out " And a demurrer to the bill was allowed. Many cases are cited in Wigram on Discovery, 81, 264, to shew that a plaintiff is not entitled in equity to a discovery as to the defendant's case or the evidence by means of which it is to be established. In *May v. Hawkins*, Parke, B., said: "I am sorry that the case should be decided upon the minor point; for, it is very much to be desired that the court should be in a position to decide the principal one. I shall continue to pursue the principle I acted upon in this case at Chambers, by refusing to allow interrogatories which are framed with a view to deprive a man of his estate. I believe that this principle is always recognised in the courts of Chancery, and I shall continue to act upon it until there is a decision to the contrary in the superior courts." And Martin, B., said: "I take the same view of the matter as my Brother Parke. I think it would be monstrous to allow this enactment to be used for the purpose of fishing out information in a matter of such a penal character as the present."

3. A third answer to the rule is, that Mrs. Wortley, if placed in the witness-box, would not be bound to answer any questions having a tendency to shew that she had incurred a forfeiture. She is within the very words of the preamble as well as of the enacting part of the enabling act of 46 G. 3, c. 37. (a)

T. E. Chitty, in support of the rule. The matters to which these interrogatories point clearly are such as might have been made the subject of a bill of discovery in equity. There is a manifest difference in this respect between criminal cases, as to which the court of equity

(a) *Byles*, Serjt., also objected that the interrogatories were not properly before the court, inasmuch as they were only referred to in the rule. But the court held this to be sufficient.

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has no jurisdiction, and forfeiture. In Mitford's Equity Pleadings, 5th edit. p. 333, the matter is thus treated: "It has been observed (p. 233), that no person is bound to answer so as to subject himself to any forfeiture, or to any thing in the nature of a forfeiture. (a) If this is not apparent on the bill, the defence must be made by way of plea. Thus, where a bill was brought to discover whether the defendant had assigned a lease, he pleaded to the discovery of a proviso in the lease, making it void in case of assignment. (b) And to a bill seeking a discovery whether a person under whom the defendant claimed was a papist, the defendant pleaded his title, and the statute 11 & 12 W. 3, c. 4, disabling papists. (c) *But such a plea will only bar the discovery of the fact which would occasion a forfeiture*: therefore, where a tenant for life, pleaded to a bill for discovery whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture, the plea was overruled. (d) So, upon a bill charging the defendant to be tenant for life, and that he had committed waste, it was determined that he might plead to the discovery of the act which would occasion the forfeiture, the waste, but that he could not plead to the discovery whether he was tenant for life or not." (d) The case of *The Attorney-General v. The Corporation of London*, 2 M'N. & G. 247, seems to shew that a defendant cannot protect himself from discovery on the ground of disclosing the evidence of his title, where his only allegation of title is negating the title of the

(a) *Smith v. Read*, 1 Atk. 527. And see *Parkhurst v. Lowten*, 1 Meriv. 391.

(b) *Fane v. Atlee*, 1 Eq. Cas. Abr. 77.

(c) *Smith v. Read*, 1 Atk. 526; *Boteler v. Allington*, 3

Atk. 457; *Jones v. Meredith*, Com. R. 661, Bunb. 346; *Har- rison v. Southcote*, 1 Atk. 528,

2 Ves. sen. 389.

(d) *Weaver v. The Earl of Meath*, 2 Ves. sen. 108.

plaintiff. The whole matter is most elaborately discussed in Story's Equity Jurisprudence, §§ 1488—1504. There was no decision of the point in *May v. Hawkins*; and the report is somewhat loose. In Hare on Discovery, 116, it is said,—“It is no objection to a bill for discovery, that the matter in question might have been the subject of an indictment or information. An action for damages having been brought against the author of a libel, a bill was filed for the discovery of evidence in support of a plea of justification. It was objected that the bill admitted the authorship of the libel; that whether true or false, it was an indictable offence; and the plaintiff, therefore, by his own shewing, came to this court to protect himself against the consequences of his crime. But it was held, that, if the plaintiff at law thought fit to treat the conduct of the defendant as a civil injury only, it was but just that the same course of defence should be open to him which was open to other defendants in civil suits. It is no objection that the action proceeds ex delicto:” *Thorpe v. Macauley*, 5 Madd. 230. Sir J. Leach there says, “No such limitation of the jurisdiction as to discovery is hinted at in any book of practice, or by the dictum of any judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are ex delicto: I am not, therefore, prepared to say that a court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy.” The same principle was affirmed by Lord Eldon in *Macauley v. Shakel*, 1 Bligh, N. S. 96. [*Williams*, J. There is a very fine distinction noticed by Vice-Chancellor Kindersley in *Hambrook v. Smith*, 17 Simons, 209, 216. “The case of *Monnins v. Monnins*, 2 Ch. Rep. 68,” he says, “no doubt seems to have decided this, that, when an estate is given to a woman durante viduitate, and where it was only to endure so long as she remained a

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widow, she might protect herself from answering as to the fact of whether she had contracted a new marriage. On the other hand, there are other cases referred to,—the case before Lord Talbot, cited in 2 Atk. 393, and other cases,—which go to shew clearly this, that the court draws a distinction between these two classes of cases: the one, where a certain estate is given to an individual, but with a condition annexed, that, upon the happening of a certain event, there shall be a forfeiture of the estate so given; the other, that an estate is so limited as only to endure till a certain event occurs, and then to go over: no doubt, in many cases, that is so, and the distinction is fine, but well established, not only as to discovery, but as to many other questions.” It is a distinction that is acted upon every day.] The mere fact of the action being to enforce a forfeiture, therefore, is no objection to the plaintiff’s right to discovery: it possibly might be a good objection to answer certain of the proposed interrogatories. All the books take a distinction between the case of a discovery of acts of forfeiture, and those which are merely collateral to forfeiture. The leading authority upon the subject is Lord Hardwicke’s judgment in *Weaver v. The Earl of Meath*, 2 Ves. sen. 108. His Lordship, in overruling the plea, there says,—“Suppose a bill for discovery of waste, charging defendant to be tenant for life, and that he committed waste; and praying that he may set forth and discover whether he is not tenant for life: he may plead to the discovery whether he hath committed waste or not, but not whether he is tenant for life or not. The plaintiff will be entitled to have such discovery; he may plead to discovery of the act causing the forfeiture; but this is not a plea to that, but to discovery of the estate. There never was such a thing heard of. Consider how far it would go. Suppose tenant for life makes a conveyance in fee for valuable consideration,

with covenant for further assurance ; and there is a bill for that further assurance, or for satisfaction on the foot of that covenant : can he plead that he is but tenant for life, and may forfeit his estate to another? Beside, it does not necessarily incur a forfeiture ; for, he may be tenant for life with a power ; which is a common case." In Story's Equity Pleadings, § 588, the rule is thus stated,—“ Although the defendant is protected from the discovery of any matter which would subject him to a penalty or a forfeiture, he may, nevertheless, be required to disclose other facts, which will have no such tendency, although they may be involved in the general result, as it is connected with the fact of penalty or forfeiture. Thus, although a man is not bound to discover whether he is married or not, for, that might subject him, if answered, to ecclesiastical censures ; yet he may be required to disclose whether he has a legitimate son (*Finch v. Finch*, 2 Ves. sen. 491). So, although a lessee for life is not bound to discover whether he has made a lease for the life of another, for, that might occasion a forfeiture of his estate ; yet he is bound to discover whether he is tenant for life or not ; for, that is a collateral matter, and not to the point of forfeiture (*Weaver v. The Earl of Meath*, 2 Ves. sen. 108). So, if a bill should be brought for a discovery of waste against a person, charging him to be tenant for life, and also charging that he had committed waste, the defendant would be bound to discover whether he was tenant for life or not, although he might demur to the discovery of the waste (*Weaver v. The Earl of Meath* ; *Harrison v. Southcote*, 1 Atk. 538 ; *Southell v. —*, 1 Younge, 308). So, although a bankrupt is not bound to discover whether he has committed any acts of bankruptcy ; yet he may be required to discover whether he has traded or not :” *Chambers v. Thompson*, 4 Bro. C. C. 434, 436. [*Cresswell, J.* The report does not shew for what the

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suit was brought in which the discovery was sought in *Weaver v. The Earl of Meath*. *Jervis*, C. J. Does the 51st section of the Common Law Procedure Act, 1854, permit interrogatories as to a matter which the witness could not be asked if he were in the box? Suppose she declines to answer some of them on the ground that her answers might tend to a forfeiture, what is to be the result? In *Fisher v. Ronalds*, *antè*, Vol. XII, p. 762, my Brother Maule and I thought that it was for the witness, and not for the judge, to determine whether or not the answer to a particular question may tend to criminate him. Some judges, however, have entertained a different opinion.] That point was under consideration in *Osborn v. The London Dock Company*, 10 Exch. 698. (a) Alderson, B., there says: "If the plaintiff should refuse to answer any of the interrogatories, without just cause, then the court or judge is impowered, under the 53rd section, to direct an oral examination of the plaintiff, upon such points as they may direct, before a judge or master. And, after the plaintiff has been sworn before a judge or master, and a question is put to him which he believes has a tendency to criminate him, he may then object to it on that ground; and, if the law be that laid down in *Fisher v. Ronalds*, his bare statement that the question has such effect will be a sufficient objection to the question." The witness must *on his oath* allege that he has a good ground to object. Could this witness, if in the box, object to answer a specific question, on the ground that it might subject her to a forfeiture? The only forfeiture which protects the witness is a forfeiture of a penal nature. This was the notion of the majority of the judges in *The Queen v. Garbett*, 2 C. & K. 474, 1 Den. C. C. 236. The construction put upon the 51st section by the court of

(a) And see *Short v. Mercier*, 3 M'N. & G. 205.

Queen's Bench in *Whateley v. Crawford and Carew v. Davis* (a), 26 Law Times, 104, is obviously the correct one. Lord Campbell there says,—“The rule is laid down rather widely in the court of Exchequer (b), where it is said that the interrogatories may be administered to the same extent as if the party interrogated was a witness under examination at the trial. I think the true rule is, that such questions may be put as may be expected to produce answers tending to advance the case of the party who puts them. The rule on this subject has, however, been very clearly laid down by that great jurist, Sir James Wigram (c); and I concur in that rule in the very terms in which he has laid it down. Whatever advances the plaintiff's case may be inquired into, though it may at the same time bring out matter which the defendant relies upon for his defence; but you shall not inquire into that which is exclusively matter of defence,—that which is common to both plaintiff and defendant may be inquired into by either. That being the rule, the great bulk of the questions in both cases which have been argued clearly falls within it; and the interrogatories, therefore, are lawful, and ought to be answered.” As to the objection that such a course as this is not allowable in ejectment, the case referred to disposes of that: and there could be no reason why the 51st section should not apply to ejectment, which is of all others the very case in which discovery is most frequently needed. It would have been easy to except actions of ejectment, if the legislature had so intended.

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JERVIS, C. J. The court will take time for consideration. As at present advised, we think it depends upon

- (a) And see Taylor on Evidence, 2nd edit. Vol. II, pp. 1131, 1135. *Dock Company*, 10 Exch. 702.
 (c) Wigram on Discovery, 13, 15.
 (b) *Osborn v. The London*

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the general question, rather than upon the particular form of the interrogatories.

Cur. adv. vult.

JERVIS, C. J., now delivered the opinion of the court :—

We have given as much consideration to this case as the short time which has elapsed since the argument has permitted; and we have come to the conclusion that the rule for exhibiting the interrogatories must be made absolute, upon a ground which was suggested, but hardly discussed at the time, viz. that this is not the proper period to urge the objection. The court of Exchequer in *Osborn v. The London Dock Company*, 10 Exch. 698, held it to be no answer to a rule under this section of the Common Law Procedure Act, that the questions proposed might tend to criminate the party sought to be interrogated, but that the objection must come from the party himself when he has been sworn. We do not say that the witness here is bound to answer the particular interrogatories. All that we do, is, to hold, upon the authority of *Osborn v. The London Dock Company*, that the objection must come from the party herself after she has been sworn, stating the grounds of her objection to each particular question.

Rule absolute.

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THIS was an action brought by the plaintiffs, the lessees of the Surrey Theatre, against the defendant, the proprietor of a place of dramatic entertainment in the City Road, called the Grecian Saloon, to recover the sum of 34*l.*, for seventeen penalties of 40*s.* each under the dramatic copyright act, 3 & 4 W. 4, c. 15, for the unauthorised representation of a dramatic piece of which the plaintiffs claimed to be the proprietors.

The declaration stated that heretofore, and before the committing of the grievances by the defendant herein-after mentioned, and after the passing of a certain act of parliament made and passed in the third year of the reign of His late Majesty King William the Fourth, intituled "An act to amend the laws relating to dramatic literary property," to wit, on the 1st of January, 1854, a certain dramatic piece was composed, printed, and published, and, from the time the same was so composed, printed, and published as aforesaid hitherto, the plaintiffs have been and still are *the proprietors thereof*, and, during all the time aforesaid, have had as of their own property *the sole liberty of representing* or causing to be represented the said dramatic piece at any place or places of dramatic entertainment whatsoever in any part of the united kingdom of Great Britain and Ireland, and in the Isles of Man, Jersey, and Guernsey, or in any other part of the British dominions: nevertheless the plaintiffs said, that, after the making and passing of the said act of parliament, and within twelve calendar

The proprietors of a theatre employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses. There was no contract in writing, nor any assignment or registry of the copyright; but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London:—Held, that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penalties under the 3 & 4 W. 4, c. 15, s. 2.

Whether, under any circumstances, the copyright in a literary work, or the sole right of representation, can become vested ab initio in an employer other

than the person who has actually composed or adapted a literary work,—*quære?*

Whether there can be a partial assignment of a copyright,—*quære?*

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months next before the commencement of this suit, and also whilst the plaintiffs were such proprietors of the said dramatic piece as aforesaid, and had such sole liberty of representing or causing to be represented the same as aforesaid, and during the continuance of such sole liberty as aforesaid, on divers, to wit, seventeen several occasions, that is to say, on the 29th, 30th, and 31st days of January, and on the 2nd, 3rd, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 22nd, 23rd, and 24th days of February, 1855, he, the defendant, *contrary to the intent of the said act of parliament, and the right of the plaintiffs as such proprietors as aforesaid, and without the consent in writing of the plaintiffs first had and obtained*, did cause certain parts of the said dramatic piece to be represented at a certain place of dramatic entertainment in England, to wit, at the Royal Grecian Saloon, in the City Road, in the county of Middlesex, contrary to the form of the statute in such case made and provided, and the true intent and meaning thereof, and contrary to the right of the plaintiffs *as such proprietors as aforesaid*, and also to their great injury, loss, and damage; whereby, and by force of the statute in such case made and provided, the defendant, in respect of each and every of the said representations, became liable to pay to the plaintiffs, *so being such proprietors as aforesaid*, and having *such sole liberty as aforesaid*, an amount not less than 40s., or the full amount of the benefit or advantage arising from each and every of such representations, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damage: And the plaintiffs say that the sum of 40s. was the greatest damages recoverable by the plaintiffs according to the form of the statute in such case made and provided, in respect of each and every of such representations of the said piece by the defendant as in this count mentioned,—whereof the defendant had

notice; whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiffs to demand and have of and from the defendant seventeen several sums of 40s.; yet the defendant hath not paid the said several sums of money, or any part thereof, to the plaintiffs: And the plaintiffs claim 34*l.*, and therefore, according to the form of the statute in such case made and provided, they bring suit &c.

The defendant pleaded,—first, not guilty,—secondly, that the plaintiffs were not the proprietors of the said dramatic piece, and had not the sole liberty of representing or causing to be represented the same, as alleged. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings at Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—In the year 1852, the plaintiffs employed one Courtney to visit Paris for the purpose more especially of seeing two plays then acting there, called “Jean le Cocher,” and “Les Bergers des Alpes,” with a view to his adapting them, or any other French dramas he might meet with, for the London stage; the plaintiffs paying his expenses, and allowing him besides a weekly salary of 2*l.* On his return to London, Courtney produced as the result of his journey a farce called “Old Joe and Young Joe,” which was brought out at the plaintiffs’ theatre, and met with some success. There was a verbal agreement between the plaintiffs and Courtney, that the former should have the right of representing any pieces written by him for them in London, the latter retaining the sole right of representation in the country. No assignment in writing was proved.

“Old Joe and Young Joe” was duly licensed by the Lord Chamberlain, and was first produced at the Surrey Theatre on the 31st of October, 1853.

On the 24th of July, 1854, Courtney assigned the

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copyright of "Old Joe and Young Joe" to the defendant, who afterwards produced it at his theatre, "The Grecian Saloon," where it was admitted that it had been played on the several days mentioned in the declaration.

Courtney, who was called as a witness, stated that there was no contract in writing between the plaintiffs and himself, but that he *verbally* gave them the right to represent the play which was the subject of this action, in London.

It was submitted, on the part of the defendant, that, to entitle them to maintain this action, the plaintiffs were bound to prove that they had become possessed of the copyright in the dramatic piece in question, by assignment from the author.

For the plaintiffs, it was insisted, that, by the bargain between them and Courtney, they were the *owners* of the piece at the time of its composition, it having been written expressly for them; or that, at all events, they acquired the sole right of representation thereof in London: and the recent cases of *Morton v. Copeland*, antè, Vol. XVI, p. 517, and *Sweet v. Benning*, antè, Vol. XVI, p. 459, were referred to.

The Lord Chief Justice declined to nonsuit the plaintiffs; and he told the jury, that, if they believed that the plaintiffs employed Courtney to write the piece for them, they thereby acquired a copyright in it.

The jury found that they did, and accordingly they returned a verdict for the plaintiffs, damages 34*l*.

Warren, Q. C., in Michaelmas Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds "that no evidence was given by the plaintiffs of their being the proprietors of the dramatic piece mentioned in the declaration, or of the sole liberty of representing it, and that no assignment from the author,

in writing, of the copyright, pursuant to the statute 3 & 4 W. 4, c. 15, was shewn, but the existence of such assignment was negatived on the plaintiffs' evidence ;" or for a new trial, on the ground of misdirection.

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Byles, Serjt., and *J. A. Russell*, on a subsequent day in the same term, shewed cause. The circumstances out of which this question arises are these :—The plaintiffs, the proprietors of a theatre, keeping what is commonly called a "stock author" for the purpose of inventing dramas, or of adapting for the stage the productions of foreign authors, at a small weekly stipend, send him to Paris, at their expense, to exercise his craft there for their benefit. On his return to this country, that gentleman composed a piece called "Old Joe and Young Joe," which he handed over to the plaintiffs, and which was produced by them at their theatre. The right of the plaintiffs to maintain this action depends upon the dramatic copyright act, 3 & 4 W. 4, c. 15. The 1st section, reciting the copyright act of 54 G. 3, c. 156, and the expediency of extending its provisions, enacts, "that, from and after the passing of this act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever, in any part of the united kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and

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that the author of any such production printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this act, or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, (a) have as his property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided, nevertheless, that nothing in this act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this act have given his consent to or authorised such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority." And s. 2 enacts, "that, if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of *the author* or *his assignee*, represent or cause to be represented, without the consent in writing of *the author* or *other proprietor* first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advan-

(a) Extended by 5 & 6 Vict. c. 45, s. 20.

tage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietor, in any court having jurisdiction in such cases in that part of the said united kingdom or of the British dominions in which the offence shall be committed : and, in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same." The direction of the Lord Chief Justice, it is submitted, was perfectly accurate. Mr. Courtney being employed by the plaintiffs to write the play, the produce of his labour became their property: though not, strictly speaking, *the authors*, they clearly are *the proprietors*. In the case of patents for inventions, if a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master: *Hill v. Thompson*, 8 Taunt. 395, 2 J. B. Moore, 424; *Barber v. Walduck*, cited in *Bloxam v. Elsee*, 1 C. & P. 567: but it is otherwise, where the master employs a skilful person *for the express purpose of inventing*; in that case, the inventions made by him so much belong to the master as to enable him to take out a patent for them: *Whitehouse's Patent*, 1 Webster's P. C. 473. In *Allen v. Rawson*, ante, Vol. I, pp. 551, 567, Erle, J., in his summing up, said,—“I take the law to be, that, if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising

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from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle." And Cresswell, J., in his judgment in that case, says: "I quite accede to the doctrine laid down in *Bloxam v. Elsee*, which was adopted by my Brother Erle at the trial." (a) It is difficult to see why a different rule should prevail in the case of copyrights. (b) The question was discussed in the recent case of *Sweet v. Benning*, ante, Vol. XVI, p. 459. The plaintiffs there were the proprietors of a weekly paper called "The Jurist," which consisted principally of reports of decisions in the various superior courts of law and equity, supplied by barristers employed by the plaintiffs for that purpose under a verbal arrangement to the effect that they should furnish reports of such cases as they thought desirable for publication in the Jurist, upon the terms of being paid a given price per sheet,—the reporters making no express reservation of a right to publish the cases themselves, and there being no express stipulation that the copyright should belong to the plaintiffs,—nothing, in fact, being said upon the subject: and this court were unanimously of opinion that the copyright was in the plaintiffs. Maule, J., said: "I think, that, where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construc-

(a) And see the summing up of Pollock, C.B., in *Minter v. Wells*, 1 Webster's P. C. 132. (b) See *Nicol v. Stockdale*, 3 Meriv. 687.

tion, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer." There is no greater incongruity in holding that one who employs another to write a book or a play for him is the "author," than there is in holding one to be the "true and first inventor" who avails himself of the skill and ingenuity of a workman in the discovery or the adaptation of a principle. If not the *author*, one who employs another to write a work for him may fairly be called the *assignee*; for, the interpretation clause (s. 2) of the copyright amendment act, 5 & 6 Vict. c. 45, enacts, that, in the construction of that act "the word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise." [Williams, J., referred to *Stevens v. Benning*, 24 Law Journ. Chan. 153. There, an author agreed with a firm of publishers that the author should prepare a legal work, and correct proofs, &c., and the publishers should pay the expenses, and the author and publishers should divide the profits equally: if a second or subsequent edition or editions should be called for, the author was to make all necessary alterations, and the publishers were to print and publish on the same conditions: the account was to be fully settled at the end of five years. A first and second edition were published. One of the publishers retired from the concern, and a new partner was taken in. One of the new firm became bankrupt, and by two instruments all the interest of the new firm in the work, and the unsold copies of the new edition, were assigned for value to S. & N. A third edition was prepared by the author, and published by another publisher, and S. & N. filed a bill against the new publisher and the au-

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thor, praying an injunction and other relief. It was held by the Lords Justices,—affirming a decision of Vice-Chancellor Wood,—that the agreement between the author and original publishers was not an assignment of the copyright; that the agreement was of a personal nature, involving mutual duties and obligations, and was not of such a nature as could be assigned without the author's consent; and that the court would not grant an injunction.] The 3 & 4 W. 4, c. 15, creates that which had no existence at common law, viz. an exclusive right to represent a dramatic piece. Early after the passing of that act, a question arose as to the meaning of the term "assignee" therein; and the court of Queen's Bench held it to mean assignee of the *copyright*, and not of the new privilege created by the act, viz. the right of representation: *Cumberland v. Planchè*, 1 Ad. & E. 580, 8 N. & M. 537. The 22nd section of the 5 & 6 Vict. c. 45,—which enacts "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book (a) shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment,"—seems to have been expressly designed to meet the case of *Cumberland v. Planchè*. [*Jervis*, C. J. Both Courtney and Shepherd stated at the trial that the understanding was, that the exclusive right of representing Old Joe and Young Joe in London was to belong to the plaintiffs, but that Courtney was to retain his right for the country. If the transaction amounted to an absolute assignment, it may be that Courtney could not make that exception; or, it may be that his retaining the copyright, or the right of representation in the country, renders the agree-

(a) The book of registry directed by s. 11 to be kept at Stationers' Hall.

ment inoperative as an assignment. The point did not distinctly arise in *Jefferys v. Boosey*, 4 House of Lords Cases, 815; but Lord St. Leonard's expressed a very strong opinion (and many of the judges concurred with him), that there could be no such thing as a partial assignment of copyright. "If," says that noble Lord, "there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible, or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom." If that be a correct exposition of the law, that which was granted to Shepherd and Creswick here is a mere licence: and, if so, you have the wrong plaintiff; for, a licensee cannot sue.] The plaintiffs rely on their being the original creators of the composition in question: they insist that they were the "proprietors" of it before the execution of the paper purporting to convey the right of representation to the defendant. In truth, there was no existing copyright until it existed in the plaintiffs.

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Warren, Q. C., and *Hawkins*, in support of the rule. The result of a decision adverse to the defendant in this case will be the utter annihilation of the law of copyright and the degradation of literature. The plaintiffs are seeking to enforce penalties for the alleged invasion of a statutory right. They were bound to shew that they were the proprietors, and that the defendant violated

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that statutory right. This they did not do. They did not produce any written instrument whereby the author denuded himself of the property which the act of parliament vested in him, and vested the copyright in the plaintiffs. The statute 3 & 4 W. 4, c. 15, which was passed in the year 1833, very carefully distinguishes between copyright and the right to represent. The plaintiffs have failed to shew that they were authors or assignees of either of those rights. The origin of the statute was this, as we learn from the case of *Murray v. Elliston*, 5 B. & Ald. 657, 1 D. & R. 299:—In 1820, Lord Byron wrote a book intitled *Marino Faliero, Doge of Venice*, an historical tragedy, in five acts, with notes; and, by deed, dated the 14th of April, 1821, he assigned the copyright and the exclusive right of printing and publishing the same to the plaintiff, in consideration of 1050*l*. The tragedy was published by the plaintiff on the 21st of April, 1821. The defendant, the then manager of Drury Lane Theatre, after the publication of the tragedy, printed and exposed to view at the entrance to the theatre, and at divers other places in the most conspicuous parts of London and Westminster, a bill of the performances at the theatre, dated the 24th of April, 1821, in which was contained the following notice:—“Those who have perused *Marino Faliero* will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ardent admirers of Lord Byron’s eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage of Drury Lane Theatre.” At the foot of the bill was the following announcement:—“To-morrow, for the first time, Lord Byron’s tragedy of *Marino Faliero, Doge of Venice*.” On the 25th of April, 1821, the

plaintiff obtained an injunction to restrain the defendant from acting the tragedy: and, it having been publicly represented at the theatre on the evening of that day, a case was sent by the Lord Chancellor for the opinion of the court of Queen's Bench, as to whether an action would lie against the defendant for such representation; and that court, after argument, certified that it would not. Lord Denman, in giving judgment in *Russell v. Smith*, 12 Q. B. 217, 236, referring to that case, says: "After the decision of *Murray v. Elliston*, it seems to have been considered that publication to an audience was not within the provision of the acts relating to copyright; consequently, stat. 3 & 4 W. 4, c. 15, was passed, and, in respect to dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage." Until, therefore, the passing of the 3 & 4 W. 4, c. 15, the right now claimed by the plaintiffs had no existence. [*Williams, J.* If the right is vested in the two plaintiffs as the employers of the actual writer of the piece, whose life is to regulate the period of enjoyment?] That, it is submitted, affords a conclusive test of the fallacy of the plaintiffs' argument in this case. The statutes clearly did not contemplate that the benefits intended to be secured to authors, should be taken from them in this way. [*Jervis, C. J.* It is plain that the right, if it ever was in Courtney, never got out of him to the plaintiffs.] The plaintiffs could only claim as "authors" or as "assignees." The latter confessedly they are not. Are they the authors? The author is he who by the power of his mind and the labour of his brain gives form to the work. [*Jervis, C. J.* That is rather begging the question. Suppose one man composes a piece of music and another adapts words to it,—who is the author?] Each, it is submitted, would be the author of that which he originated. The question arose in *Leader v. Purday*, antè, Vol. VII, p. 4, where

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it was held, that one who adapts words to an old air, and procures a friend to compose an *accompaniment* thereto, acquires a copyright in *both words and accompaniment*; and his assignee, in declaring for an infringement, may describe himself as proprietor of the copyright in *the whole* composition. In the course of the argument in that case, Wilde, C. J., having remarked that "Horne was employed to compose it for Bellamy," Mr. Serjt. Byles answered,—“That does not make the product of the composer’s brain the property of the employer.” This, it must be remembered also, is an action for penalties. The case of *Sweet v. Benning*, antè, Vol. XVI, p. 459, turned upon the 18th section of the 5 & 6 Vict. c. 45, which makes a special provision as to articles written for a periodical,—giving a right in derogation of the common law right. Then, are the plaintiffs assignees? The law requires the assignment to be *in writing*, attested by two witnesses, if not by deed,—*Power v. Walker*, 3 M. & Selw. 7, 4 Campb. 8; *De Prinna v. Pinna*, 8 C. & P. 78; *Davison v. Bohn*, antè, Vol. VI, p. 456; *Leader v. Purday*, antè, Vol. VII, p. 4; per Lord St. Leonard’s, in *Jefferys v. Boosey*, 4 House of Lords Cases, 994. Indeed the 13th section of the 5 & 6 Vict. c. 45, which makes an entry in the register at Stationers’ Hall equivalent to an assignment, assumes that an assignment otherwise must be, not only in writing, but by deed. There was here neither assignment nor entry upon the register. Then, it is insinuated, rather than contended, that the plaintiffs are assignees in contemplation or by operation of law. Those words, however, in the statute were inserted with reference to the possibility of the right being vested in one who has become an assignee in bankruptcy or insolvency. At the most, the evidence here offered places the plaintiffs in the position of licensees, with none of the rights which were intended by the statute to

be conferred exclusively upon the author or upon one who has acquired the copyright from the author by assignment: and the present claim is opposed to the whole policy of the statute on which it professes to be founded.

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JERVIS, C. J. The question is one of very considerable importance, and therefore we will look into it before we pronounce our judgment.

Cur. adv. vult.

JERVIS, C. J., delivered the judgment of the court.

This is an action for alleged piracy of a dramatic piece called "Old Joe and Young Joe," the exclusive right of representing which upon the London stage is alleged to belong to the plaintiffs.

It appears that the plaintiffs, being the proprietors of the Surrey Theatre, agreed by word of mouth with one Courtney, that the latter should go to Paris for the purpose of adapting a piece there in vogue, for representation upon the English stage; that the plaintiffs should pay all Courtney's expenses, and should have the sole right of representing the piece in London, Courtney retaining the right of representation in the provinces. Courtney accordingly proceeded to Paris, produced the piece in question, and was paid by the plaintiffs as agreed. The piece was brought out at the Surrey Theatre by the plaintiffs; and afterwards at the Grecian Saloon, by the defendant, who had obtained an assignment from Courtney.

The question is, whether the plaintiffs, by the transaction between them and Courtney, became entitled to the sole right of representation of this piece in London, so as to be able to maintain the action. This depends upon the construction of the "Act to amend the laws relating to dramatic literary property," 3 & 4 W. 4, c. 15.

1856. That act, after reciting the previous statute of 54 G.
SHEPHERD 3, c. 156, as to copyright in books, and that it was expedient to extend the provisions of that act, enacted that
v. "the author of any tragedy, comedy, play, opera, farce,
CONQUEST. or any other dramatic piece or entertainment, composed and not printed and published by the author thereof, or his assignee, or which hereafter shall be composed and not printed or published by the author thereof, or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the united kingdom of Great Britain and Ireland, or the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid not printed and published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof," for a period mentioned in the act, and since extended by the 5 & 6 Vict. c. 45, s. 20. The 2nd section gives to "the author or other proprietor" a right of action against any person who shall, "contrary to the intent of this act or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof."

It could not be successfully contended for the plaintiffs that a right once acquired under this statute could be assigned without writing. The 2nd section, in rendering a consent in writing necessary to justify a single representation, involves this consequence, that an assignment conveying the exclusive right to represent throughout Her Majesty's dominions, or (if that be possible) in some definite part of them, must, in order to be valid, be in writing; and there was no such assignment to the

plaintiffs. The plaintiffs have no right, therefore, unless it can be established, that, by reason of the relation between them and Courtney, this right devolved upon them at the moment when the piece was composed. Accordingly, it was contended, on their behalf, that, under the circumstances, Courtney was to be considered as merely their servant, the produce of whose labour became the property of his masters at the moment of production, so that no assignment was necessary to vest the property in the latter; and the case was likened to those relating to patent inventions, in which suggestions of servants employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by his employer, and incorporated into his design, without detracting from the originality necessary to sustain a patent for the entire.

To these might be added the case of *Harfield v. Nicholson*, 2 Law Journ. 90, 102, 2 Sim. & Stu. 1, in which Sir John Leach suggested the application of a similar principle to copyright, in the following words:—"I am of opinion, that, under that statute [8 Anne, c. 19], the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally." Also, it may be added, that, in the extract from *Merlin*, tit. *Contrefaçon*, § xi, the words "author" and "inventor" are said to be synonymous. And, indeed, it has been contended that the productions of an author are to be dealt with in the same manner as the inventions of a workman,

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and that the former, like the latter, may become the property of an employer who hires the author's labour, and, as it was said, "buys his brains."

To this it was answered, that literary productions stand upon different and higher ground from that occupied by mechanical inventions; that the intention of the legislature in the enactments relating to copyright, was, to elevate and protect literary men; that such an intention could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer who took no intellectual part in the production of the work, could without an assignment in writing vest the proprietorship of it in the latter. To this might be added, as to literary property and patents for inventions, that they are both creatures of the statutes; that the enactments upon which they are respectively founded, differ widely in their origin and in their details; and that, in order to shew that the position and rights of an author within the copyright acts, are not to be measured by those of an inventor within the patent laws, it is only necessary to bear in mind, that, whilst on the one hand a person who imports from abroad the invention of another previously unknown here, without any further originality or merit in himself, is an inventor entitled to a patent, on the other a person who merely reprints for the first time in this country a valuable foreign work, without bestowing upon it any intellectual labour of his own, as, by translation, which to some extent must impress a new character, cannot thereby acquire the title of an author within the statutes relating to copyright.

We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested ab initio in an em-

ployer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea : and it is upon the author in the first instance that the right is conferred by the statute which creates it.

We cannot bring our minds to any other conclusion than that Courtney, the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and, so far as that adaptation gives any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs have no assignment in writing of that right, they cannot sue for an infringement of it.

As to the case of *Sweet v. Benning*, antè, Vol. XVI, p. 459, referred to as an authority in favour of the plaintiffs, the decision there turned upon the construction of the peculiar provisions of the 18th section of the 5 & 6 Vict. c. 45, relating to periodical works, and it has no bearing upon the present case.

The rule to enter a nonsuit must be made absolute.

Rule absolute.

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A. agreed to sell to B. 500 shares in a lead-mine, and a transfer paper in the usual form was made out in blank, signed by A., and sent to B., who kept it, but never signed his acceptance of the shares on the transfer paper, nor ever took it to the purser of the mine to get the transfer registered; and so the shares remained on the books of the company in A.'s name.

Calls having been afterwards made in respect of the shares, which A. was obliged to pay,—Held (upon the authority of *Humble v. Langston*, 7 M. & W. 517), that no contract was to be implied on the part of the buyer either to register the shares in his own name or to indemnify the seller against any calls which he might be required to pay by reason of non-registration.

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THIS was action to recover the amount of certain calls on mining shares.

The first count of the declaration stated that the plaintiff, before and at the time of the sale of the shares and of the delivery of the transfer thereof thereafter mentioned, was possessed of five hundred shares in a certain mine, called the Cefn Gwyn mine, of which shares he was registered owner; and thereupon, in consideration that the plaintiff would sell the said shares to the defendant, and execute and deliver to the defendant a transfer of the said shares, the defendant promised the plaintiff to buy and accept the same, and to pay to the plaintiff 300*l.* for the same, and to indemnify and save harmless the plaintiff from all subsequent payments and liabilities for or in respect of the said shares, or for or in respect of any calls which should or might thereafter be made upon or in respect thereof; and, although the plaintiff did sell the said shares to the defendant, and execute and deliver to the defendant a transfer of the said shares pursuant to the said agreement, and the defendant accepted and received the same from the plaintiff, and paid him for the same according to the said agreement; and although the plaintiff had performed and been ready and willing to perform all things on his part to be performed; and although subsequently to the said sale of the said shares, and the delivery of the said transfer, the plaintiff, as such registered owner as aforesaid, became and was liable to divers calls made subsequently to the said sale and delivery of the said transfer, for and in respect of the said shares respectively, and was obliged to pay the same,—of all which the defendant,

within a reasonable time in that behalf, had notice, and was requested to indemnify and save harmless the plaintiff from the said payments and liabilities; yet the defendant did not nor would indemnify or save harmless the plaintiff from the said payments, or any of them, although a reasonable time in that behalf had elapsed before the commencement of the suit.

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The second count stated that the plaintiff was possessed of the said shares, and registered as the owner thereof as in the first count mentioned, and the said mine was worked by a company, and, according to the rules and regulations of the said company, the person registered as the owner of shares therein remained and continued liable to calls made in respect of the said shares while he continued and was registered as such owner; and thereupon, in consideration that the plaintiff would sell to the defendant the said shares, and that the plaintiff would deliver to the defendant a transfer of the said shares signed by the plaintiff, he the defendant promised the plaintiff that he the defendant would accept and pay for the same, and cause the said shares to be registered in his the defendant's name as owner thereof, according to the rules and regulations of the said company, within a reasonable time in that behalf, so that the plaintiff might be relieved from further liability in respect of the said shares; and that, although the plaintiff performed all things on his behalf, and such reasonable time had elapsed before the commencement of this suit, yet the defendant did not, within such reasonable time, or at any other time, cause the said shares to be registered in his the defendant's name as owner thereof, or otherwise, but left and continued the same registered in the plaintiff's name, whereby he became liable to and was compelled to pay a large sum of money for calls subsequently made on the said shares.

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Third count.

The third count stated that the plaintiff was possessed of, and registered as the owner of, the said shares as aforesaid, according to the rules and regulations of the said company, and the defendant bought the said shares, and the plaintiff delivered to the defendant the said transfer thereof as aforesaid; that the said mine was worked by the said company, and, according to the rules and regulations of the said company, the person registered as the owner of shares therein remained and continued liable to pay calls made in respect thereof so long as he continued and was so registered, but such liability ceased upon his selling the said shares and the vendee thereof being registered as the holder of the said shares, according to the rules and regulations of the said company, in the place and stead of the former person so registered as owner as aforesaid,—of all which the defendant, at the time of the said sale, and delivery of the said transfer, had notice; and, by reason of the premises, it then became the duty of the defendant to cause to be registered the said shares in his the defendant's name as owner thereof, within a reasonable time in that behalf, according to the rules and regulations of the said company, but he did not register, nor had he at any time registered the said shares in his the defendant's name as owner thereof, according to the said rules and regulations, although a reasonable time in that behalf had elapsed before the commencement of the suit; whereby the plaintiff was obliged to pay calls subsequently made upon the said shares, and was otherwise damnified.

Fourth count.

There was also a count for money paid by the plaintiff to and for the use of the defendant at his request. And the plaintiff claimed 1000*l*.

Particulars of demand.

The following particular of the plaintiff's demand under the indebitatus count was deliver under a judge's order:—

"1852, May 3. Paid by plaintiff for defendant, being calls					1856.		
on 500 Cefn Gwyn lead-mine shares, at					£	s.	d.
1s. 6d. per share					37	10	0
Sept. 25. Do.	.	.	do.	.	37	10	0
" 1853, Mar. 26. Do.	.	.	do.	.	37	10	0
July 21. Do.	.	.	do.	.	37	10	0
Sept. 20. Do.	.	.	do.	.	37	10	0
Dec. 10. Do.	.	.	do.	.	37	10	0
" 1854, Jan. 31. Do.	.	.	do.	.	37	10	0
April 12. Do.	.	.	do.	at 2s. per share	50	0	0
June 7. Do.	.	.	do.	at 1s. per share	25	0	0
Aug. 12. Do.	.	.	do.	at 1s. 6d. per share	37	10	0
					£375	0	0

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"And interest thereon from the date of the respective calls, at 5% per cent. per annum, until payment."

Pleas, first (to the first and second counts), non assumpsit,—secondly (to the third count), not guilty,—thirdly (to the first count), that the plaintiff was not possessed of the said shares in the said mine, nor any of them, nor was he the registered owner of such shares, or of any of them, in manner and form as alleged,—fourthly (to the first count), that the plaintiff did not sell the said shares, or any of them, to the defendant, nor did he execute or deliver to the defendant any transfer of the said shares, or any of them, pursuant to the supposed agreement in the declaration mentioned, nor did the defendant accept or receive the same, or any of them, from the plaintiff, in manner and form as alleged,—fifthly (to the first count), that the plaintiff, as such registered owner as aforesaid, did not become, nor was he, liable to any calls made subsequently to the said supposed sale and delivery of the said transfer, for and in respect of the said shares respectively, nor was he obliged to pay the same, or any of them, as alleged,—sixthly (to the second count), that the plaintiff was not possessed of the said shares in the said mine, nor any of them, nor was he registered as the owner thereof, as alleged,—seventhly (to the second count), that, accord-

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To third count.

ing to the rules and regulations of the said company, the person registered as the owner of shares therein did not remain and continue liable to calls made in respect of the said shares while he continued and was registered as such owner, in manner and form as alleged,—eighthly (to the second count), that the plaintiff did not become, nor was he, liable to, nor was he compelled to pay any sum of money for any calls made on the said shares, or any of them, subsequently to such sale, as alleged,—ninthly (to the third count), that the plaintiff was not possessed of, or registered as the owner of, the said shares, or any of them, according to the rules and regulations of the said company, as alleged in the said count,—tenthly (to the third count), that the defendant did not buy the said shares, or any of them, nor did the plaintiff deliver to the defendant the said transfer thereof, as alleged,—eleventhly (to the third count), that the person registered as the owner of shares in the said company did not by the rules and regulations thereof remain or continue liable to pay calls made in respect thereof so long as he was so registered, in manner and form as alleged,—twelfthly (to the third count), that it did not become the duty of the defendant to cause to be registered the said shares in his the defendant's name as owner thereof, according to the rules and regulations of the said company, as alleged,—thirteenthly (to the third count), that the plaintiff was not obliged to pay any calls made upon the said shares, or any of them, subsequently to such sale, as alleged,—fourteenthly (to the residue of the declaration), *nunquam indebitatus*. Issue.

The cause was tried before Williams, J., at the first sitting in London in Trinity Term last. The facts were as follows:—The plaintiff discounted for the defendant a bill for 1000*l.*, giving him in exchange for it five hundred Cefn Gwyn mining shares, valued at 300*l.*, and the balance (less discount) in cash. A transfer paper

in the usual form was made out and signed by the plaintiff, but with a *blank* therein for the name of the transferee, and sent to the defendant, who retained it. The defendant, however, never signed his acceptance of the shares on the transfer paper; nor did he take it to the purser of the mine in order to get the transfer registered. The plaintiff's name still appearing on the books of the mine as a registered holder of the shares, he was called upon and compelled to pay several calls upon the shares in question made after the date of the transfer. And the present action was brought to recover the amount of the calls so paid. The plaintiff failed at the trial to prove any *express* promise on the part of the defendant to indemnify him against future calls: but he relied upon the facts above stated as shewing an implied undertaking to indemnify.

On the part of the defendant, reliance was placed upon the case of *Humble v. Langston*, 7 M. & W. 517. There, on the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter railway, at 7*l.* 5*s.* per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3rd of March, the defendant wrote to the plaintiff's brokers, requesting them to "despatch the thirty Bristol and Exeter shares forthwith;" and they replied the same day, "we herewith send you transfer of thirty Bristol and Exeter shares *in blank*." This was accordingly done, and the purchase-money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls,—it was held,

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that, under the above circumstances, there was no undertaking implied by law to indemnify against the subsequent calls, nor any evidence of such an undertaking in point of fact.

The learned judge, upon the authority of that case, nonsuited the plaintiff.

Macnamara, in Trinity Term last, obtained a rule nisi to enter a verdict for the plaintiff for 375*l.* (pursuant to leave reserved to him at the trial), on the ground that it was the duty of the defendant to indemnify the plaintiff against the calls made in respect of the 500 Cefn Gwyn shares sold by the plaintiff to the defendant, or to register himself (the defendant) as holder thereof,—the defendant to be at liberty, on shewing cause, to argue, if necessary, that the nonsuit should be retained, or that a new trial should be had, on the grounds, amongst others, that there was no proof of any agreement in writing for the sale or promise to transfer the shares in question, as the paper produced in evidence for that purpose did not contain all the terms alleged to constitute the contract; that such an agreement in writing was required, as being a transfer of an interest in land; and that no transfer of the shares as alleged in the declaration was shewn, but only a request to transfer, and, if such request amounted to a transfer, it required a stamp, by the 55 G. 3, c. 184.

Byles, Serjt., *Alexander*, and *H. Pearson*, shewed cause. The question here is, whether a promise on the part of the defendant to indemnify the plaintiff against future calls in respect of these shares, is to be implied by law from the circumstances proved at the trial; or whether the law casts upon the defendant a duty to cause himself to be registered as owner of the shares. *Humble v. Langston*, 7 M. & W. 517, 2 Railway Cases,

533, conclusively shews that there is no such implied indemnity: and it makes no difference, that there the transfer was by deed. That case was recognised in *Sayles v. Blane*, 14 Q. B. 205, a passage in the judgment in which case will probably be relied on in support of the argument that there was a duty cast upon the defendant to register himself as holder of the shares. But that was extrajudicial. *Wynne v. Price*, 3 De Gex & S. 310, which was cited on the motion, has not much to do with the question. *Humble v. Langston* was not cited there; and the decision proceeded upon the ground of the relation between trustee and cestui que trust. [*Williams*, J. A court of equity will, on a case for specific performance, put the parties in the same position as they would have been in at the time of the bargain, if all had been done which ought to have been done.] At the most, equitable rights and liabilities pass by these papers: there is no privity between the vendor and a sub-vendee. To require the execution of a transfer every time these shares change hands, would be manifestly inconvenient, and contrary to the general understanding and course of business. The question, however, is no longer an open one: it must be considered as concluded by *Humble v. Langston*. [*Willes*, J. *Humble v. Langston* is recognised by Vice-Chancellor Wigram in *Phené v. Gillan*, 5 Hare, 1, which seems to shew that there may be a remedy in equity, though none be enforceable in a court of law. *Jervis*, C. J. It is difficult to see why there should be a different rule prevailing at law from that observed in equity, where there is direct privity between the parties.] The transfer paper, as it is called,—though, if it amounts to a transfer, it clearly would require a stamp; *Toll v. Lee*, 4 Exch. 230,—gives no legal right, and therefore imposes no legal duty. This court has no power to order that to be done which it is alleged to be the defendant's

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duty to do. It has no means of doing justice between the parties, by taking the account of profits on the one side and payments in respect of calls on the other. In *Watson v. Spratley*, 10 Exch. 222, three of the judges held that a shareholder in a mine worked upon the cost-book principle has not an interest in land, so as to require the transfer thereof to be in writing: but Parke, B., dissented. [*Jervis*, C. J. It is the practice of this court always to defer to decisions of other courts of co-ordinate jurisdiction. The main point raised in this case is decided by *Humble v. Langston*; and the majority of the court in *Watson v. Spratley* decide that the transfer of these shares conveys no interest in land. Possibly, therefore, we may decide this case in conformity with both those cases,—deferring to the decision in *Humble v. Langston*, though it may be a little doubtful, and also to that of the majority of the court in *Watson v. Spratley*; and so both points may be put in train for an ultimate decision by a court of error. It is most important that a deliberate decision of one court should be acted upon in the others, until overruled by competent authority.]

Macnamara, in support of his rule. The distinction between this case and *Humble v. Langston* is manifest. There, the special act required the transfer to be *by deed*,—giving a form, in which the transferee's name appeared. For the same reason, the court held the transfer void in *Hibblewhite v. M'Morine*, 6 M. & W. 200. Here, however, the fact of a blank being left for the name of the transferee of the shares was perfectly immaterial: the defendant might at any time have made the instrument complete by filling in his name. Instruments not under seal may always be perfected thus,—as in the case of bills of exchange accepted in blank: *Schultz v. Astley*, 2 N. C. 544, 2 Scott, 815. Assuming that

these documents are intended to pass from hand to hand, there can be no reason why the defendant should not be liable for calls so long as he remained the holder. [*Williams, J.* Notwithstanding what was done, the plaintiff remained the only person who was at law entitled to the profits on the shares.] It is submitted, the plaintiff had parted with his right and title to the shares; and the defendant had acquired the right to them, and with it the burthen of causing himself to be registered as owner. That being so, there was an implied duty on him so to do. It is not contended that the defendant would be entitled at law to the profits; but that the circumstance of the plaintiff having at his request put him in a position to acquire that equitable right, raises a legal duty in him to exonerate the plaintiff from the payment of future calls. It is upon this principle that the holder of a bill of lading becomes chargeable with freight: for, "if a person accept anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself; and the law may very well imply a promise to perform what he has so taken upon himself:" *Abbott on Shipping*, 5th edit. 286, 8th edit. 421; cited by *Bosanquet, J.*, in *Lucas v. Nockells*, 1 Clark & Fin. 457. Unless this kind of duty exists, the parties would be in this position,—if the concern turned out to be profitable, the transferee would avail himself of the right to get registered; if otherwise, he would repudiate it. [*Williams, J.* If there were profits, and the plaintiff received them, could the defendant have recovered them from him at law?] Perhaps not. It may be that he would be accountable as agent or trustee: but, if not, it is the defendant's own fault. [*Crowder, J.* Unless the plaintiff can recover in this way, he would seem to be altogether without remedy.] The judgment of the court of Queen's Bench in *Sayles v. Blane*, 14 Q. B. 205, assumes that it was the duty of

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the transferee to cause the transfer to be registered. "The plaintiff," they say, "being the registered owner, was called upon to transfer to the defendant, and did so by a deed regularly executed. *It was then the duty of the defendant to have procured that deed to be registered,* which appears as well by the custom and usual course of dealing, as by the decision of Vice-Chancellor Knight Bruce, in *Wynne v. Price*, 3 De Gex & S. 310." *Humble v. Langston* was cited there. In *Wynne v. Price*, the facts were these:—A shareholder in an incorporated railway company instructed a stock-broker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B. (another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time, on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor. And, upon a bill filed by the vendor for the purpose of compelling B. to register himself, so as to become a shareholder according to the 8th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, Vice-Chancellor Knight Bruce said,—“The facts of this case effectually preclude the defendant from denying privity between him and the plaintiff. The defence is without apology or excuse. The defendant must pay the calls that have been made since the sale. He must indemnify the plaintiff against all future calls in respect of the shares, and must take proper measures to procure himself to be registered. The manner of expressing the decree may require consideration. As to its substance there is no difficulty. There must be a reference to the master, if necessary, to inquire what calls have been

made, when they were made, and what is due in respect of them. The defendant must execute the transfer deed, and deliver it to the secretary, in conformity with the act of parliament; and the plaintiff must authorise the trustees of the company to deliver the certificates to the defendant, who must pay the costs of the suit." A similar intimation of opinion had been given by the same learned judge in *Shaw v. Fisher*, 2 De Gex & S. 11. [*Williams, J.* No doubt the facts in *Humble v. Langston* were such as would have induced a court of equity to put the parties in the same position as if there had been a legal transfer at the time. *Jervis, C. J.* I must confess I have always understood that the *legal obligation* results from a *legal interest*: you are seeking to establish that a legal obligation results from an *equitable* interest.] It is not true, as suggested on the other side, that *Wynne v. Price*, proceeded upon the ground of the relation between trustee and cestui que trust; or that there is any such difficulty as supposed, in compelling the defendant to register himself as the owner of the shares. [*Jervis, C. J.* The suggestion is, that this court cannot take upon itself the exercise of an equitable jurisdiction, where complete justice cannot be done between the parties. *Williams, J.* Substantially, you are seeking to make the defendant pay the calls here.] No doubt that is so. The question in *Phené v. Gillan*, 5 Hare, 1, arose between mortgagor and mortgagee: the point now before the court was not necessary to the decision of that case. The giving up of title by the plaintiff, and the vesting it in the defendant, or giving him the means of vesting it in himself, created a legal obligation on his part, if not to indemnify the plaintiff, at all events to make himself the legal owner of the shares.

Cur. adv. vult.

JERVIS, C. J. This case was argued in the last term,

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1856. before my Brothers Williams, Crowder, and Willea, and
WALKER myself. We have considered it, and I now proceed to
v. give the judgment of my Brothers Williams and Willea
BARTLETT. and myself,—my Brother Crowder entertaining some
difficulty on the point.

The material facts of the case appear to be these:—
The defendant, being the holder of a bill of 1000*l.*, got
it discounted by the plaintiff; and it was agreed between
them that 500 shares in the Cefn Gwyn mine, belong-
ing to the plaintiff, should be taken at a given price by
the defendant, in part of the discount. Shortly after-
wards a transfer paper, as it was called, in the usual
form, made out in blank, and signed by the plaintiff, was
sent to the defendant, who duly received and kept it,
but never signed his acceptance of the shares on the
transfer paper, nor ever took it to the purser of the
mine, to get the transfer registered; and so, in fact, the
shares still remained on the books of the company in the
plaintiff's name. After the transfer paper was sent to
the defendant, a call was made, which the plaintiff, as
registered shareholder, was obliged to pay; and this
action was brought to recover from the defendant the
call so paid, in the shape of damages.

There were substantially two counts in the declara-
tion,—one alleging a promise to indemnify the plaintiff
against future calls, and the other alleging a promise to
register the shares.

At the trial, before my Brother Williams, an attempt
was made (which entirely failed) to prove an express
promise, in support of the last count. The facts already
stated were then relied upon in support of the other.
But the learned judge nonsuited the plaintiff, upon the
authority of *Humble v. Langston*, 7 M. & W. 517.

A rule nisi for a new trial having been obtained, cause
was shewn against it in last Michaelmas Term, and the
court took time to consider their judgment.

Having done so, it appears to us that we are bound by the authority of *Humble v. Langston*, which we are unable to distinguish from the case now before us.

In the present case, as in that of *Humble v. Langston*, there was a contract to purchase shares, which remained the property of the seller, as between him and his co-partners, until the fact of transfer was communicated to the officer of the company, for the purpose of registration. In the present case, as in that, it was necessary that there should be a document signed by the seller, indicating his intention to transfer the shares, and that that document should be produced to the officer, in order to notify the change of ownership in the shares. In the present case, as in that, such a document was signed by the seller, but with a blank for the name of the intended transferee. And the question in each case was, whether there was to be implied on the part of the buyer a contract either to register the shares in his own name, or to indemnify the seller against any calls which he might be required to pay, by reason of non-registration. In the case of *Humble v. Langston*, as we read the judgment, the circumstance that a blank was left for the name of the transferee was considered to rebut the inference that the buyer undertook to complete the transfer in his own name, and to shew the intention of the parties that he should be at liberty to sell his right to the shares in statu quo to any other person, without himself becoming the transferee; the fact of the blank being so left, indicating, as it was said, that the buyer was not expected to become the transferee himself, and that, whatever purchaser of the right to the shares might think proper to clothe himself with the legal title, should fill in the blank with his name, and procure an entry of the then apparently complete and binding instrument in the company's book.

This indication of the intention of the parties being

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considered by the court of Exchequer to be sufficient to rebut any inference of a contract to complete the transfer by registration in the name of the purchaser, which might otherwise have been drawn from the fact of a contract for sale, the court dealt with the alleged liability to indemnify as being matter purely of equitable jurisdiction. The principal contract being one to purchase, the liability to indemnify arose, they said, not from any collateral or implied contract to that effect, but from the existence of the relation of trustee and cestui que trust; which they said was created between the seller and the purchaser or the person to whom the purchaser had transferred his right to have the shares, and who for the time being had the beneficial interest in them.

If that be the correct view of the relation of the parties, it disposes of the present case, unless some substantial distinction can be pointed out between it and the case in the Exchequer; since we ought, for the sake of uniformity, so long as that case remains unquestioned in a court of error, to abide by the rule there laid down, in the decision of all similar cases.

Then, has any such substantial distinction been pointed out? We think not. The fact that the transfer in that case must have been by deed, and that, as a deed, it was wholly void by reason of the blank, was not the ground upon which the judgment of the court proceeded. That judgment was founded upon the supposed intention of the parties, apart from the fact that the deed was in itself invalid: and, indeed, it was decided by the same judgment, that the preparation of the deed lay with the purchaser, and not with the seller, and that, in that respect, there was no default in the latter. The substance of the decision was, that the contract was one of purchase, not of indemnity; and that there was no breach of the contract to purchase, because the form of the document by which the parties *intended* the transfer to have been effected, shewed that the purchaser was not

expected to register it in his own name, and that it was not stipulated that it should be acted upon before either the purchaser, or some person to whom he might transfer his interest, thought proper to complete his legal title, by producing it to the officer of the company; that the seller, therefore, not having stipulated that the transfer should be completed in any given manner or any given time, could not sue as for a breach of contract by reason of its not having been completed in the name of the purchaser before a call was made; and that, consequently, he had no remedy to enforce an indemnity by action as upon a contract express or implied, but must proceed in equity, founding himself upon the right to indemnify which flows from the relation of trustee and cestui que trust,—that relation existing between him and the purchaser, or sub-purchaser, who for the time being might have the beneficial interest in the shares, and the right to be registered as owner.

Whether that view was one which we might have taken if the question had been free of authority, it is not necessary to say; since we think it would be highly objectionable that this court should lay down different law from that acted upon, after full consideration, by the court of Exchequer; and still more so that the authority of a decision in that court should be got rid of by a difference in the facts, not affecting the reasons upon which the judgment purported to proceed.

Upon the authority of the case of *Humble v. Langston*, therefore, we are of opinion that the ruling of my Brother Williams at the trial was correct, and that this rule ought to be discharged.

CROWDER, J. I wish merely to add that I yield a reluctant assent; and that I yield solely under pressure of the authority of *Humble v. Langston*.

Rule discharged.

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Bankrupt, v. GRAY.

Jan. 23.

In consideration of certain periodical payments, A. agreed to build a ship for B., to be launched on or before the 31st of July, 1853. The agreement contained the following proviso,—"Provided always and it is hereby expressly agreed between the said parties, their executors, &c., that, in case A. should fail to complete the said ship according to the covenants and stipulations hereinbefore contained to be performed on his part, then it shall be lawful for B. to enter upon and take possession

of the said ship or vessel (which from and after the payment of the first instalment shall and be deemed and continue to be as soon as the said ship or vessel shall be commenced every respect and for every purpose the property of B.), and to cause the works he agreed to be done to be completed by any person whom he shall see fit to employ therein using such of the materials of A. as shall be applicable to the purpose," &c.,—A. to pay to B. so much as he should expend thereon in excess of the contract price.

A. having failed to complete the ship by the stipulated time, B. took possession of and (after an act of bankruptcy committed by A.) proceeded to finish her, using the certain materials which were in the yard, and were suitable but had not been specially appropriated by A. to the ship. Some of these materials had been selected by B. A.'s bankruptcy, and some were placed within the carcase of the ship, the remainder shed alongside: but none of them had actually been used by B. before A.'s bankruptcy:—

Held, that the assignees were entitled to recover against B. the whole value of materials.

THIS was an action in which the plaintiffs, as assignees of Thomas Young, a bankrupt, complained that the defendant converted to his own use, or wrongfully deprived the plaintiffs, as such assignees, of the use and possession of the goods, to wit, timber, planks, machines, materials, stock for ship-building, and other materials, of the plaintiffs as such assignees.

The defendant pleaded,—first, as to part of the goods, payment into court of 8*l.*,—secondly, as to the residue of the goods, not guilty,—thirdly, as to the said residue, that the said residue was not the goods of the plaintiffs, as such assignees.

To the first plea the plaintiffs replied damages *ultra*; and, upon the other pleas, they joined issue.

At the trial, a verdict was found for the plaintiffs upon all the issues, damages 360*l.*, subject to a special case for the opinion of this court, with liberty to carry the special case into a court of error, if either of the parties required it.

The plaintiff Baker is the official assignee, and the

other plaintiffs are the creditors' assignees of Thomas Young, a bankrupt, who was a ship-builder at Howdon Pans, in the county of Northumberland. The defendant is a ship-owner at North Shields, in the same county. On the 2nd of March, 1853, an agreement in writing, under hand only, was entered into between the defendant of the one part, and the said Thomas Young of the other part, whereby,—after reciting that an agreement had been come to between the said parties for the building and launching of the hull of a vessel at the building-yard of the said Thomas Young, and for the purchase thereof, it was witnessed, that the said Thomas Young, in consideration of the several payments thereafter mentioned, did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the defendant, that he the said Thomas Young, his executors, administrators, and assigns, would build and complete for the defendant in a good and workmanlike manner, the hull of a vessel of certain dimensions, and of a description therein specified; and that the said vessel should be launched by the said Thomas Young, his executors, administrators, or assigns, on or before the 31st of July, 1853: And the defendant did thereby covenant, promise, and agree, with the said Thomas Young, that he, the defendant, would pay to the said Thomas Young, as the price of the said ship, the sum of 8510*l.* in manner following, that is to say, when rammed 100*l.*, when framed 100*l.*, when timbered, chocked, and dressed 100*l.*, when planked top-high 100*l.*, when beamed 100*l.*, when decked and top-caulked 100*l.*, and when fully planked 100*l.*, when ready to caulk 100*l.*, and when launched and made tight 100*l.*, and when completed and builder's certificate and classification delivered 900*l.*, and the remainder of the said purchase-money by bills drawn upon the defendant and accepted by him, at six, nine, and twelve months,—the first of

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such bills being for 600*l.*, the second for 600*l.*, and the third for 510*l.*; which said bills should respectively bear date on the day of the said ship being launched and the builder's certificate and classification being delivered: And it was thereby agreed that such damage as should happen to the said ship from fire or otherwise, previously to the completion of the said agreement, should be made good by the said Thomas Young: And it was thereby provided and expressly agreed, that, in case the said Thomas Young should fail to complete the said ship according to the covenants and stipulations thereinbefore contained to be performed on his part, then it should be lawful for the defendant to enter upon and take possession of the said ship or vessel (which from and after the payment of the first instalment should be and be deemed and continue to be as soon as the said ship or vessel should be commenced, in every respect, and for every purpose, the property of the defendant), and to cause the works thereby agreed to be done to be completed by any person whom he should see fit to employ therein, *using such of the materials of the said Thomas Young as should be applicable to the purpose*, and to pay to such person such reasonable sum as he should see fit to agree upon; and that the said Thomas Young should forthwith on demand pay to the defendant all such sums as he should so pay in advance, the defendant in that case, nevertheless, paying and allowing to the said Thomas Young, on the final completion of the said vessel, the amount of the contract price thereby agreed upon.

In pursuance of this agreement, a ship was laid down and begun to be built for the defendant by the said Thomas Young, in his building-yard at Howdon, which he rented of the Tyne Improvement Commissioners as tenant from year to year, and for which the plaintiffs have paid the rent becoming due since his bankruptcy. He proceeded with the building of the ship down to the

7th of January, 1854, when he ceased to work, being embarrassed in his circumstances. At this time, the ship was still unfinished. Between the entering into the contract and the ceasing of the said Thomas Young to work at the ship, the defendant, in payment of the price of the ship, had advanced him a considerable sum for wages of workmen employed about the ship, and greatly exceeding the amount of the first of the said instalments of the price of the ship; and had also guaranteed the payment for various lots of timber and materials sold by different merchants to the said Thomas Young, for the purpose of being used by the said Thomas Young in the building the said ship, and which were brought to the said building-yard for that purpose. The sums advanced for wages, and guaranteed for timber and materials, and which latter have been paid by the defendant, exceed the agreed price of the ship; and, prior to the 17th of December, the said Thomas Young had given the defendant receipts for several sums, together 3334*l.* 15*s.*, which had then already been paid by the defendant for wages, or, under his guarantees, for timber and materials. On the 18th of the same month, the said ship being in an unfinished state, the defendant, by his agent, Mr. G. F. Lowrey, served the following notice on the bankrupt:—

“ Mr. Thomas Young, Howard Street, North Shields. Whereas, by virtue of a memorandum of agreement bearing date the 2nd of March, 1853, and entered into between William Gray, of North Shields, in the county of Northumberland, ship-owner, of the one part, and you, Thomas Young, of the other part, whereby you contracted to build a vessel as therein set forth, to be completed on or before the 31st of July last; and whereas you have failed to perform the said recited contract: I therefore hereby give you notice to proceed to complete the said vessel pursuant to your said agreement,

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 to the stipulations contained therein, complete the same,
 and will hold you answerable to me for such sums as I
 may expend over and above the amount stipulated in
 the said agreement; and shall proceed against you for
 all damages that I may receive in consequence of your
 non-performance of the said agreement. Dated this
 18th of January, 1854.

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(Signed) "G. F. Lowrey,

"Attorney for the said W. Gray."

On the 23rd of the same month, the said ship being
 in an unfinished state, the defendant served on the said
 Thomas Young the following notice:—

"Mr. Thomas Young, ship-builder, Howdon.

"Sir,—I hereby give you notice that I have entered
 upon and taken possession of the vessel in course of
 building by you for me, you having failed to complete
 the same according to agreement dated March 2nd, 1853,
 and by which agreement it is lawful for me to enter
 upon and take possession for the purpose of completing
 the same: therefore, I further give you notice that any
 hindrance or obstruction from you, or any person else,
 will be prosecuted to the utmost rigour of the law.
 Witness my hand, this 23rd of January, 1854.

(Signed) "W. Gray."

At the time when this notice was served, there was on
 the said building-yard of the said Thomas Young a large
 stock, consisting of timber, deals, oak, staging, tools,
 and other materials of and belonging to him the said
 Thomas Young, and provided and prepared by him for
 the building of the said ship. On that day the defend-
 ant took possession and completion of the ship into his
 own hands; and, between that day and the 26th of the
 same month, *he assorted into lengths all the timber, deals,
 and materials applicable to the completion of the vessel
 according to the said agreement, and he removed a*

*quantity of the same timber and deals within the frame or corpus of the ship, but which were not at that time actually built in or attached to the said ship, but part of them were used for staging, and were of the value of 160*l.*, and which last-mentioned timber and deals, as also all the other timber, deals, and materials so assorted as aforesaid, were eventually, but after the date of the act of bankruptcy, used by defendant in the completion of the said vessel ; other portions of Young's stock, which were not applicable to the completion of the vessel, the defendant did not use, and the same were sold by the plaintiffs under the bankruptcy.*

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On the 26th of the same month, the said Thomas Young, the defendant, and the plaintiffs Pow and Ekless, both creditors of Young, met at the office of Mr. Tinley, the plaintiffs' attorney, who was also a creditor of Young, when an assignment by Young to the plaintiffs Pow and Ekless, for the benefit of his creditors was resolved on, and defendant agreed to purchase the whole of Young's said stock for 650*l.* (as well that portion which forms the subject of this inquiry, as that subsequently sold by the assignees, and produced 62*l.*), and pay the same, to the said Messrs. Pow and Ekless, the trustees named in the said assignment, by his acceptance at four months ; but he afterwards declined to fulfil his agreement.

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ruptcy.

On the said 26th of January, the said Thomas Young executed an assignment of all his estate and effects, and gave formal possession of the same, including the said stock and materials, to the plaintiffs Pow and Ekless, for the benefit of his creditors ; and, in the defendant's presence, formal possession of the whole of the stock and materials in the building-yard was taken by the said Messrs. Pow and Ekless ; but the defendant retained actual possession of the timber and materials selected by him as aforesaid : and notice of the said assignment was then given to the defendant.

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On the 28th of the same month, the following notice was served on defendant by the plaintiffs' attorney:—

“ Dockwray Square, 28 January, 1854.

“ Sir,—As solicitors to Messrs. Pow and Ekless, the trustees under a deed of assignment executed by Thomas Young for the benefit of his creditors, we hereby give you notice and require you to quit possession of the building-yard, sheds, and hereditaments, lately in the occupation of the said Thomas Young, situate at Howdon-Pans, in the county of Northumberland; and, in case of your declining or making default therein, we shall treat you as a trespasser, and eject you without ceremony.

“ We remain, &c.

“ Jno. & Jno. F. B. Tinley.

“ To Mr. William Gray,

“ Sidney Street, Tynemouth.”

A petition in bankruptcy against the said Thomas Young was filed on the 11th of February following; and, on the 15th of the same month, he was adjudicated a bankrupt, the act of bankruptcy being the assignment of the 26th of January. On the same 15th of February, the plaintiff Baker was appointed the official assignee; and, on the 24th of the same month, the plaintiffs Pow and Ekless were appointed the creditors' assignees. Notwithstanding this, the defendant still continued to use in the building and completing of the said ship the said timber and materials selected and set apart by him as before mentioned; and he therewith, and with other materials purchased by him, completed the said ship according to the said agreement in all respects.

It was agreed that the value of the part of the said selected timber and materials, so used by the defendant after the 26th of January, was 360*l.*; and that the part removed into the frame or corpus of the ship previous to that date was of the value of 160*l.*

It was also agreed that the court might draw any inference from the foregoing facts that a jury might draw.

The question for the opinion of the court was, whether, under the circumstances above stated, the plaintiffs were entitled, as such assignees, to recover the value of the said timber and materials used and converted by the defendant after the committing of the act of bankruptcy by the said Thomas Young, or such part thereof as the court might think fit. If the court should be of opinion that the plaintiffs ought to recover, then the verdict was to stand for such sum as the court should direct, with costs: but, if the court should be of opinion that the plaintiffs were not entitled to recover, then a verdict was to be entered for the defendant, with costs.

S. Temple (with whom was *Heath*), for the plaintiffs. (a) The plaintiffs are entitled to recover the whole 360*l*. The utmost right the defendant could have under the agreement would be, to use in the completion of the ship any materials *belonging to the bankrupt* that should be

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

“1. That, although the building contract vests in the defendant the ship and the frame thereof, as soon as the first instalment of the price should be paid, and gives a licence, in certain events, to him to use the bankrupt's materials; yet no property in such materials vested in the defendant until they became part of the ship:

“2. That no user of such materials short of actually incorporating them with and mak-

ing them part of the ship, could vest the property in such materials in the defendant:

“3. That, none of the materials for the conversion of which this action is brought having been incorporated with or made part of the ship, the property in the same materials remained in the bankrupt at the time of his bankruptcy, and became then vested in the plaintiffs, his assignees, who were entitled to recover the value of the same, the defendant having had notice of the act of bankruptcy at the time it was committed.”

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applicable to the purpose. The real question is, whether the timber and materials used by the defendant in the completion of the ship, were, at the date of the act of bankruptcy, viz. the 26th of January, the property of Young, so as to pass to his assignees. It will be said on the other side, that the agreement conferred upon the defendant a power or licence coupled with an authority, of which Young's bankruptcy could not divest him. The cases upon that subject are very fully gone into in *Wood v. Leadbitter*, 13 M. & W. 838. That case, however, shews, that, to be available, the licence must involve a grant of the property. Alderson, B., in delivering the judgment of the court, there says,—“It may be convenient to consider the nature of a licence, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C. J. Vaughan's elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his reports. The question there was as to the right of the crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those statutes. In the course of his judgment, the Chief Justice says,—Vaughan, 351,—‘A dispensation or licence properly *passeth no interest, nor alters or transfers property in anything*, but only makes an act lawful which without it had been unlawful. As, a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but, as to the carrying away the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of

eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent, and not directly, and as its effect, a dispensation or licence may destroy and alter property.' Now, attending to this passage, in conjunction with the title '*License*' in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a licence is in its nature revocable, we have before us the whole principle of the law on this subject. A mere licence is revocable: but that which is called a licence is often something more than a licence: it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident." What was the licence here? To complete the ship, with power to use any suitable materials which were the property of Young. The ship, according to the terms of the contract, was to become the property of the defendant progressively as it was built: but the materials in the yard, however applicable, unless actually fitted to the ship, did not: *Mucklow v. Mangles*, 1 Taunt. 318; *Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 Ad. & E. 467, 6 N. & M. 399. In *Laidler v. Burlinson*, 2 M. & W. 602, the contract was an entire contract to purchase the ship when finished, and no property could pass until then. It is conceded here that the ship, and each timber or plank of the ship, became the property of the defendant as it was built in to the frame of the ship. Possibly even if prepared for fitting, though not actually fitted, it would equally pass. But the case does not state that any labour had been bestowed upon the materials in question,—simply that they or some of them were selected, some set apart, and some laid within the body of the ship. If this were a licence which involved a

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grant, it was revoked by the bankruptcy. In *Howes v. Ball*, 7 B. & C. 481, 1 M. & R. 288, A. agreed to give B., a coach-maker, 100*l.* for a coach, and to pay for the same by four bills of 25*l.* each; and, further, that B. should have a claim upon the coach until the debt was duly paid. The bills were given, but the first was not paid when it became due. A. died. His administratrix sent the coach to B. to have the wheels repaired; B. detained it, on the ground that the bills had not been paid: and it was held, in an action of trover brought by the administratrix, that the agreement operated as a mere licence from A. to B. to take the coach if the bills were not paid; that it was not transferable, and that the coach, having vested in the administratrix by operation of law, the defendant was not justified in detaining it. In giving judgment, Lord Tenterden says: "The utmost effect that can be given to this instrument, is, to construe it as a licence given by Howes to Ball to resume possession of and retain the coach, in case Howes did not pay the bills. Construing it as a licence, it is a personal licence, not available against any person to whom Howes might transfer the property. It could not, therefore, be available against his administratrix, to whom the property came by operation of law. If Howes had lived, and the coach, on non-payment of the bills, had been taken out of his possession, and he had brought an action, the defendant might, in bar of that, have relied on the instrument. But, as the licence was a mere personal licence, not transferable, supposing the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach. The rule for entering a nonsuit must, therefore, be discharged." So, in *Roffey v. Henderson*, 17 Q. B. 574, where a landlord had granted to an outgoing tenant a licence to enter and take away fixtures in the event of

the succeeding tenant not agreeing to take them, and the succeeding tenant refused either to take them or to permit him to enter for the purpose of taking them away, it was held, that the licence, being personal only, and not being by deed, did not bind the second tenant. These cases shew, that the agreement here could at the most only amount to a personal licence obligatory upon the bankrupt himself, but not binding upon his assignees. Suppose the agreement operated to pass the property, it could only be upon the ground that it had been executed by an actual assertion of that right before the bankruptcy, — *Hawthorn v. The Newcastle-upon-Tyne and North Shields Railway Company*, 3 Q. B. 734, n., 2 Railway Cases, 288.

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Unthank (with whom was *Byles*, Serjt.), contrà. (a) The defendant, before he took possession of the goods in question, had therein a property coupled with an interest, which could not be taken from him. The clause in the agreement which gave him that right, is in these terms, — “ Provided always, and it is hereby expressly agreed

(a) The points marked for argument on the part of the defendant were as follows:—

“That all the timber and materials the subject of this action, were materials of the bankrupt applicable to the purposes of completing the ship: that the power of using such timber and materials was a power coupled with an interest, and conferred on the defendant rights of which Young, if he had not become bankrupt, could not have deprived the defendant: that the defendant had the same rights against the assignees: that these rights

of possession and user vested in the defendant prevented the said timber, &c., from passing to the assignees, or at any rate prevented their acquiring such right of property and possession as would enable them to maintain an action of trover: that the said timber and materials were not, at the time of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the defendant's consent: and that all the timber and materials were sufficiently appropriated by the defendant before the bankruptcy.”

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between the said parties, their executors, administrators, and assigns, that, in case the said Thomas Young should fail to complete the said ship according to the covenants and stipulations hereinbefore contained to be performed on his part, then it shall be lawful for the said William Gray to enter upon and take possession of the said ship or vessel (which from and after the payment of the first instalment shall be and be deemed and continue to be, as soon as the said ship or vessel shall be commenced, in every respect and for every purpose the property of the said William Gray), and to cause the works hereby agreed to be done to be completed by any person whom he shall see fit to employ therein, *using such of the materials of the said Thomas Young as shall be applicable to the purpose*, and to pay to such person such reasonable sum as he shall see fit to agree upon." At the time of the exercise of this power,—which was evidently inserted for the benefit of both parties,—the time for the completion and delivery of the vessel was past. The clause must receive a reasonable construction. [Crowder, J. Do you make any distinction between the timber and materials which were outside and that which was placed within the ship?] None. The placing it inside the frame of the ship, or setting aside for the use of the ship, was a mere step towards the application of it. Having ascertained what was applicable to the completion of the ship, the defendant set it apart for future use. As against the bankrupt, the defendant clearly would have a right under the contract so to do. Considerable labour might have been bestowed in fashioning some of the timber, which might make it convenient to both parties that that particular timber should be used. The intention obviously was, to confer on the defendant the power to use the timber in question, and probably also to impose upon him a duty to use it. If so, it is not the case of a mere licence, but a grant: or, if a licence, it is

coupled with an interest, and could not be revoked. It comes within the definition given by Vaughan, C. J., in *Thomas v. Sorrell*. The case of *Lunn v. Thornton*, ante, Vol. I, p. 379, shews that a valid grant may be made of goods which are not in existence, or which do not belong to the grantor, at the time of the execution of the deed, provided the grantor ratifies the grant by some act done by him, with that view, after he has acquired the property therein. *Congreve v. Evetts*, 10 Exch. 298, however, is nearer to this case. There, S., by indenture, assigned to the plaintiff (amongst other things) his crops of grain upon his farm, as a security for money lent. By the indenture, it was declared and agreed that it should be lawful for the plaintiff at any time to seize and take possession of the crops and other effects thereby bargained and sold, and all such crops and other effects which should or might from time to time be substituted in lieu of the crops thereby assigned, or which should from time to time be found on or about the farm, and the same to sell and dispose of, and out of the proceeds pay all costs and retain all moneys due to the plaintiff. On the 21st of February, 1849, a sum of 1297*l.* 18*s.* 7*d.* being then due to him, the plaintiff seized and took possession of some crops of grain then growing on the farm, and which had been sown by S. subsequently to the execution of the indenture. In Trinity Term, 1848, the defendant recovered a judgment against S., and on the 22nd of February, 1849, a writ of fi. fa. indorsed to levy 310*l.* 19*s.* 3*d.* was issued on such judgment, and delivered to the sheriff for execution, who on the same day seized the said crops. On the 8th of March, 1849, S. petitioned the insolvent debtors court under the 7 & 8 Vict. c 96. The official assignee in the first instance claimed the crops, and a bill was filed by him in the court of Chancery to restrain the plaintiff from selling them, which bill was dismissed

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upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to the crops. The sheriff afterwards sold the crops for 294*l.*, which came to the hands of the defendant; and, the plaintiff having sued the defendant for the same, it was held,—first, that, supposing the debtor had not petitioned the insolvent debtors court, the plaintiff had a right to recover; for, though the power to seize *future crops*, if unexecuted, would have been of no avail against the defendant's execution, since it gave no legal or equitable title to any specific crops, yet, when the power was executed to the extent of the plaintiff's taking possession of the then growing crops, he was in the same situation as if the debtor himself had delivered them to him, and consequently his title would prevail against that of the defendant;—and, secondly, that the circumstance of the defendant having petitioned the insolvent debtors court subsequently to the seizure *and before the sale* of the crops, did not affect the plaintiff's right, since the meaning of the 21st section of the 7 & 8 Vict. c. 96, is, that no creditor under a bill of sale not completely executed before the petition shall avail himself of it to the prejudice of the *general body of creditors*: and therefore, although the bill of sale was inoperative as against the assignee, yet, as he abandoned his claim, it was valid as against the defendant. In giving judgment, Parke, B., says,—“If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but, when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the cre-

ditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect, *after actual possession* by the creditor, is the same." [*Cresswell*, J., referred to *Gale v. Burnell*, 7 Q. B. 850.] That case cannot be law. *Congreve v. Evetts* is an express decision; and there *Lunn v. Thornton* was cited. [*Jervis*, C. J. I think it never could have been intended by this clause to alter the property in the timber until it was used for the completion of the ship. Until actually incorporated with the ship, it never ceased to be the property of Young.] Until selection made of that which was applicable to the completion of the ship, the whole no doubt belonged to Young. It must be conceded that the defendant could have had no right, unless he had in fact begun to use the materials: *Rouch v. The Great Western Railway Company*, 1 Q. B. 51, 4 P. & D. 688. [*Williams*, J. Then you admit that the authority would be determined by the bankruptcy, if there had been no using?] Yes. [*Jervis*, C. J. The whole question turns upon the meaning of the word "using."] It cannot mean actually fixing to the ship, otherwise much expense might be bestowed upon the timber without the property in it passing to the defendant. [*Williams*, J. It is a question of degree. If the timber were fashioned ready to fix in the ship, clearly that would be an user or appropriation of it. *Jervis*, C. J. Merely walking round the yard, and pointing to certain materials as those that would be required, would not be enough.] It is enough to say that the facts stated here shew an user. Further, it is submitted that the intervention of the bankruptcy makes no difference. The assignees take only that which the bankrupt was legally and equitably entitled to. If the bankrupt has entered into a contract which in equity binds the goods to the ship, they do not pass to the assignees. *Hawthorn v. The Newcastle-upon-Tyne and North Shields Railway Com-*

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pany is a distinct authority in favour of the defendant. There, a railway company entered into a contract (dated the 17th of December, 1837,) with certain builders, R. R., and J. P. R., for building a bridge, all necessary implements and materials to be found by the builders, with power to the company, if, in the opinion of the architect, the said contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works, giving seven days' notice of such intention; and, in such case, to use the cranes, machines, implements, and materials used on or about the works by the said contractors, who were to defray the extra expenses so incurred. The contract also provided, that the company should have a lien upon such machines, implements, and materials as should for the time being be in and upon the land, as a security for the completion of the bridge. On the 20th of July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds,—1. Those actually on the line of railway, value 61*l.* 13*s.* 6*d.*,—2. Those upon land adjoining the line of railway (not the property of the company, but inclosed and taken possession of by them under the act), value 634*l.* 13*s.* 9*d.*,—3. Those deposited upon the line of a temporary railway made by the bankrupts over land not belonging to the company, for the convenience of conveying materials; the value of these was 7*l.* 19*s.* 6*d.*; that of the materials of the temporary railway, 131*l.* 15*s.* 4*d.*,—4. A crane erected by the contractors at the end of the temporary railway, value 50*l.* On the 31st of July, the company took possession of all these goods. On the 1st of August, they gave the seven days' notice that other workmen would be employed; and, on the 2nd, they took upon themselves the completion of the bridge,

using some of the goods, and retaining the remainder. In an action of trover brought by the assignees of the bankrupts for these goods,—it was held, that the company had a lien on the first and second classes, but not upon the third and fourth, which, nevertheless, at the expiration of the notice, they had a right to retain and use about the work. [*Jervis*, C. J. In that case, there was a defined power to seize,—not, as here, a contest on the title. There was an authority. That is a point I cannot get over.] The intention here was, that the defendant should have power to take and to use all suitable materials for the completion of the ship.

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Temple, in reply, was stopped by the court.

JERVIS, C. J. In the view I take, it becomes unnecessary to consider the difficult and somewhat complicated question which has been argued. This case must, as it seems to me, be determined on the meaning of the word “using” in the contract. I think it is most likely that the parties intended that all timber which had been provided for the construction of the ship should be the property of the defendant, in the event of the builder failing to perform his contract. But I do not think they have used language sufficiently clear to carry that intention into effect. The proper construction of the language they have used, I take to be this,—so long as any of the timber and materials upon the premises remains the property of the builder, the owner of the ship shall be at liberty to use so much thereof as may be applicable to the completion of the ship: but that, until it is actually used, or the owner has commenced using it, it shall continue the property of the builder. It clearly was not competent to the defendant, upon the builder’s failure to complete the ship by the stipulated time, to take *all* the timber which might be

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upon the premises and impound it and say he will use it in completing the ship. Until it was actually used, or commenced using, the property remained in the builder. If so, it is admitted that the instrument does not attach. In my opinion, the word "using" does not carry with it the rights which Mr. Unthank suggests. I do not express any opinion as to whether, in order to give the defendant a right to the materials, they should be actually fastened to the ship. But I clearly think that the mere selection or placing the timber in the hull of the vessel, is not an user within the contemplation of this contract. I therefore think the plaintiffs are entitled to judgment for the whole sum claimed.

CRESSWELL, J. I am of the same opinion. The difference in the mode of wording the authority to take the ship and the authority to use the timber, is very remarkable. "Provided always and it is hereby expressly agreed between the said parties, &c., that, in case the said Thomas Young should fail to complete the said ship according to the covenants and stipulations hereinbefore contained to be performed on his part, then it shall be lawful for the said William Gray to enter upon and take possession of the said ship or vessel (which from and after the payment of the first instalment shall be and be deemed and continue to be, as soon as the said ship or vessel shall be commenced, *in every respect and for every purpose the property of the said William Gray*), and to cause the works hereby agreed to be done, to be completed by any person whom he shall see fit to employ therein:" and then it goes on to say,—"*using such of the materials of the said Thomas Young as shall be applicable to the purpose.*" It does not give the defendant power to *take possession* of such materials as may be applicable or reasonably fit for the purpose: but it authorises, and probably compels, him

to use in the completion of the ship such of the timber as may be on the premises, and applicable or fit for the purpose. I therefore think no property in any of the materials could be acquired by the defendant until he commenced at all events to use them. Here, the timber was merely piled in the ship as in a shed or storehouse. I am clearly of opinion that the whole of it passed to Young's assignees.

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WILLIAMS, J. I am of the same opinion; and that opinion I found upon the simple ground, that, before the bankruptcy of Young, the defendant had not used or begun to use the materials in question. Beginning to use, that is to prepare, the timber to attach it to the ship, might have given the defendant a right to retain it, either by reason of the deed conferring an interest, and therefore being irrevocable, except in the event of bankruptcy, or by way of creation of a power afterwards made effectual by being executed by taking possession of the subject matter. I must confess I do not feel at all shaken by the case of *Gale v. Burnell*, 7 Q. B. 850. I do not think that case at all conflicts with the doctrine that a deed may confer a power over future chattels as soon as they are acquired. It is unnecessary to pursue the inquiry further. It is clear the defendant did not use these materials in any degree. It is true, he appropriated them for the purpose and with the intention of using them. But he did not use them. They therefore passed to the assignees.

CROWDER, J. I concur with the rest of the court in thinking that the plaintiffs are entitled to judgment for the whole amount claimed, on the ground that the defendant had not used, or begun to use, any part of the materials in question at the time of Young's bankruptcy. It seems to me that the whole argument urged on the

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part of the defendant proceeds upon the assumption that the words of the agreement relating to the materials are to be construed in the same way as the words applicable to the ship. If the words used had been the same as to both, I think the argument would have been well founded. But I agree with my Brother Cresswell, that the language used shews a distinction between the two to have been intended. The ship is to be taken possession of: the materials are to be used. Nothing here was used, or even begun to be used, which remained the property of Young.

Judgment for the plaintiffs. (a)

(a) See *Hope v. Hayley*, 26 Law Times, 199. A deed of indemnity to sureties, for valuable consideration assigned premises, goods, chattels, stock in trade, dye-wares, &c., to the defendants, upon trust that they should "stand possessed of the same on trust to take possession thereof, including all substituted consumable stores, pursuant to the declaration thereafter contained, when and as he or they should think fit." The declaration referred to was, "that, when and as any of the dye-wares, &c., shall be used up, consumed, dead, sold, or worn out, and others in the ordinary course of business substituted, they shall belong to the defendants upon the trusts hereinbefore contained, and be considered to be included in this assignment." Under this deed, the grantees having taken possession of the premises assigned, and divers substituted articles therein, continued in posses-

sion for about six months before the bankruptcy of the grantor. In an action by the assignees of the bankrupt, to recover the value of the substituted articles taken, it was held that the grantees were entitled to them, the deed creating a power to take them, and they having exercised that power. Lord Campbell said: "The intention of the parties was, that the property should pass by the deed itself, but that was not carried into effect in the manner in which the parties wished, by the words of transfer: but I am of opinion that the deed contains a clear permission or power to the defendants to take these goods, which is enough even if there had been no attempt to transfer the goods. Routledge (the assignor) must be considered as assenting to the defendants becoming proprietors of the goods. He buys the goods that were substituted, and consents to the property in them

passing: that is abundant evidence of an act done by him within the meaning of Lord Bacon's maxim.* The case of *Congreve v. Evetts*, 10 Exch. 298, would have been an authority, if this deed had not contained the ineffectual words of

transfer; but these words though inoperative, are strong to shew the intention. The dictum of Tindal, C. J., in *Lunn v. Thornton*, ante, Vol. I, p. 385, is in favour of the defendants."

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* "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu." Bacon's Maxims, 14.

KENDALL and Others v. DAVID KING, Clerk to the Committee of Visitors of THE CAMBRIDGESHIRE, ISLE OF ELY, AND BOROUGH OF CAMBRIDGE PAUPER LUNATIC ASYLUM.

Jan. 23.

THIS was an action to recover a premium of 150 guineas alleged to be payable by the committee of visitors of the Cambridgeshire, Isle of Ely, and Borough of Cambridge Pauper Lunatic Asylum, to the plaintiffs, as architects; and also to recover under the indebitatus counts of the declaration the sum of 891*l.* 5*s.* claimed to be due to them for work and labour done by them at the request of the said committee, and for commission payable in respect thereof.

The first count of the declaration stated that the defendant was clerk to the committee of visitors of the Cambridgeshire, Isle of Ely, and Borough of Cambridge Pauper Lunatic Asylum, being a committee appointed under and in pursuance of an act of parliament made and passed in the session of parliament held in the 8th and 9th years of the reign of Her present Majesty,

visitors in the name of their clerk, in respect of a contract so entered into by them,—although the plaintiff might have no means of enforcing his judgment when obtained.

By the 17th section of the 8 & 9 Vict. c. 126, a select number of the justices for a county or borough, called the "committee of visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c.; and, by s. 16, they were enabled to sue and be sued in the name of their clerk:—

Held, that an action might be maintained against the committee of

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intituled, "An Act to amend the laws for the provision and regulation of lunatic asylums for counties and boroughs, and for the maintenance and care of pauper lunatics, in England:" That the said visitors caused an advertisement to be published, whereby they agreed to give the sum of 150 guineas for such plan as they might consider the best and most economical, including estimates and specifications, for the erection of a pauper lunatic asylum, about three miles eastward of Cambridge, capable of containing two hundred inmates, with efficient classification, and to be constructed so as to admit of additions if subsequently required,—the sections to shew the mode of ventilation, supply of water to, and warmth of wards, with efficient drainage,—the plan and estimate to include lodge at the principal entrance; and that it was thereby stated that the premium would only be given to the competitor whose plans, estimates, and specifications, after the approval by the visitors, should be sanctioned by Her Majesty's secretary of state, provided such competitor was not employed in the execution of the works; that the plans were to be marked as therein mentioned, and sent to the office of the clerk to the visitors on or before the 30th of November then next, which said time was afterwards extended by the said visitors to the 30th of December then next; and that the said visitors agreed that the said premium should be paid upon the completion and delivery to the clerk to the said visitors of all necessary drawings and sections requisite for carrying such plan into effect; but that, if the person sending in such plan should be employed in the superintendence of the erection of the asylum, the remuneration to such person for such plans, specifications, drawings, and sections, should be included in the payment for such superintendence: That, in pursuance of the said advertisement and agreement, the plaintiffs completed and sent in and delivered to the

clerk of the said visitors, within the said extended time, certain plans, estimates, specifications, and sections, for the erection of the said asylum, in accordance with the terms of the said advertisement; and that the same included all necessary drawings and sections requisite for carrying such plans into effect; and that the same were accepted and approved, and considered by the said visitors as the best and most economical of the plans, estimates, sections, and drawings sent in under the said advertisement, and were sanctioned by Her Majesty's secretary of state: The declaration then alleged that the plaintiffs had done all things necessary to entitle them to receive the premium of 150 guineas; and that they had not been employed in the superintendence of the erection of the said asylum, or the execution of the works in the said advertisement mentioned; and alleged as a breach the non-payment of the premium.

There were also counts for money payable by the said visitors to the plaintiffs for the work, labour, journeys, and attendances of the plaintiffs done and performed by them for the said visitors at their request, and for commission payable by the said committee to the plaintiffs in respect thereof, and for money found to be due from the said committee to the plaintiffs on accounts stated between them.

The defendant pleaded,—first, that the visitors did not promise as alleged,—secondly, that the said plans, estimates, specifications, and sections so sent in and delivered as in the first count alleged, did not include all necessary drawings and sections requisite for carrying such plans into effect,—thirdly, that the said plans, estimates, specifications, and sections were not accepted by the said visitors, as alleged: and, to the indebitatus counts, that the said visitors never were indebted as alleged. Issue thereon.

The cause came on for trial before Jervis, C. J., at

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the sittings in London after Hilary Term last, when a verdict was taken by consent for the plaintiffs for the amount claimed by the declaration, subject to a reference to a barrister.

The order of nisi prius contained, amongst others, the following stipulations,—That the sum of 150 guineas should be paid by the defendant to the plaintiffs without prejudice to any question in the action; that the arbitrator should, at the request of either party, raise, by way of special case, any point of law for the opinion of the court; and that, if the arbitrator, or the court, should say that the said action would not lie, then he and the court should say what, and against whom, in his and their opinion, was the remedy; and, in any event, what the amount due to the plaintiffs.

Under this order, the arbitrator, having taken upon himself the arbitration, stated the following case for the opinion of the court :—

The plaintiffs, during all the time mentioned in the case, were architects, carrying on business in partnership at No. 33, Bunswick Square, London, and No. 4, King's Parade, Cambridge.

The defendant, during the same period, was, and still is, clerk to the committee of visitors of the Cambridge-shire, Isle of Ely, and Borough of Cambridge Pauper Lunatic Asylum, which was a committee annually elected under and according to the provisions of the 8 & 9 Vict. c. 126, whilst that act was in force, to carry out the provisions of that act on behalf of the county of Cambridge, the Isle of Ely, and Borough of Cambridge, and, since the repeal of that act, elected in the same manner, under and according to the provisions of the 16 & 17 Vict. c. 97, for the same purposes, as respects the latter act.

This body is throughout this case referred to as "the committee of visitors," or "the committee," and was, at the respective times of the issuing of the advertise-

ment and performing the works hereinafter mentioned, and at the time of the issuing of the writ in this action, composed in part of the same persons, and in part of different persons.

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In the month of September, 1850, the committee of visitors, in pursuance of a resolution passed by them on the 13th of that month, caused the following advertisement to be published in *The Times*, *The Cambridge Chronicle*, and other newspapers:—

“A premium of 150 guineas will be given by the visitors of The Cambridgeshire, Isle of Ely, and Borough of Cambridge Pauper Lunatic Asylum, for such plan as may be considered by the visitors the best and most economical, including estimates and specifications, for the erection of a pauper lunatic asylum about three miles eastward of Cambridge, capable of containing two hundred inmates, with efficient classification, and to be constructed so as to admit of additions, if subsequently required. The sections to shew mode of ventilation, supply of water to, and warmth of, wards; with efficient drainage. The plans and estimates to include lodge at principal entrance. The visitors reserve the right of not necessarily accepting such plans and estimates as specify the lowest amount for execution of the works; and also the right of rejecting all the plans sent them: and the premium will only be given to the competitor whose plans, estimates, and specifications, after approval by the visitors, shall be sanctioned by Her Majesty's secretary of state, provided such competitor is not employed in the execution of the works. The plans to be marked, and sent sealed to the office of the clerk of the visitors, Cambridge, on or before the 30th of November next, addressed to the visitors, accompanied by a sealed envelope, containing the distinguishing mark, with the name and address of the party sending the same. Any further information may be obtained, on

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King, clerk to the visitors, Cambridge.

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In pursuance of this advertisement, the plaintiffs wrote to the defendant, as clerk to the said committee, on the subject of the advertisement; and, on the 24th of September, the defendant, as such clerk, forwarded to them, in answer, a copy of a resolution passed by the committee of visitors at the last-mentioned meeting, as follows :—

“That the plans and specifications accepted by the visitors, shall, upon the secretary of state approving thereof, become the property of the visitors, for which the person sending in the same shall be entitled to receive (provided such person is not employed in superintending the erection of the asylum) 150 guineas, to be paid upon the completion and delivery to the clerk to the visitors of all necessary drawings and sections requisite for carrying such plans into effect: but, if the person sending in such plans shall be employed in the superintendence of the erection of the asylum, the remuneration to such person for such plans, specifications, drawings, and sections, shall be included in the payment for such superintendence.”

The time for sending in the plans was afterwards extended by the committee until the 30th of December, 1850; on which day the plaintiff sent in to the defendant, as clerk to the committee, plans, estimates, specifications, and drawings for the proposed asylum, which included all necessary drawings and sections required by the advertisement as a condition to the payment of the premium.

Fifty-three competition plans were sent in, by various other architects.

On the 4th of February, 1851, the committee of visitors, at a meeting of their board, appointed a sub-

committee, from their own body, to examine and report upon the plans and estimates thus sent in.

This sub-committee, at a meeting held on the 24th of March, 1851, made their report to the committee of visitors; and, at the same meeting, the committee accepted and approved of the plaintiffs' said plans, estimates, specifications, and drawings.

The defendant, as clerk, by the directions of the committee, informed the plaintiffs thereof; and such plans, estimates, specifications, and drawings were afterwards, in January, 1852, approved by the commissioners in lunacy, and the secretary of state for the home department.

In the latter part of January, 1852, and after the approval of the plaintiffs' plans by the lunacy commissioners and the secretary of state, the defendant, as clerk to the committee of visitors, and on their behalf, gave directions to the plaintiffs to prepare certain working drawings, to enable builders to make tenders for the execution of the works. The plaintiffs accordingly commenced the working drawings under their instructions.

At a meeting of the committee of visitors, held on the 5th of February, 1852, the defendant, as their clerk, reported to the committee that the plaintiffs' plans had been approved by Sir George Grey, Her Majesty's secretary of state for the home department, and that such plans were then in the hands of the plaintiffs, to enable them to complete the working drawings: and the committee then, at such meeting, proceeded to appoint a sub-committee of their body to view the ground on which the proposed asylum was intended to be built, and to confer with the architects as to the most eligible spot upon which to erect the same, and to report thereon to the general committee.

On the 9th of February, 1852, the defendant, as clerk to the committee of visitors, informed the plaintiffs, by

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letter, of the appointment of the sub-committee for the above purpose, and requested their attendance at the proposed meeting at Fulbourn (the site of the intended asylum); and on the 20th of February (the day appointed), the plaintiffs, in consequence, met the sub-committee there. The site of the proposed asylum was then staked out by Mr. Kendall, in their presence; and Mr. Kendall, under their instructions, then made a plan, which he delivered to the defendant for the sub-committee, shewing the position of the intended building.

On the 21st of February, 1852, a meeting of the committee was held, which was attended by Mr. Kendall; and the defendant, as clerk, then reported to the committee that the sub-committee had met the architects on the ground on the 20th instant, and that they had agreed to the following report, which was then read:—

“Cambridgeshire, Isle of Ely, and Borough of Cambridge Pauper Lunatic Asylum.

“The sub-committee appointed by the committee of visitors, at a meeting held on the 5th instant, to view the ground and confer with the architects as to the most eligible spot upon which to erect the proposed asylum, and to report thereon to the general committee, beg to report as follows:—

“That your committee met on the ground, on Friday, the 20th instant, and, after inspecting the site, and consulting with the architects, who attended them, they unanimously agreed that the spot indicated on the block plan coloured red is the most eligible upon which to erect the proposed asylum; the principal front of the building facing the turnpike-road leading from Cambridge to Fulbourn, as shewn on the approved plans.”

The committee then resolved,—“that the report of the sub-committee be adopted and confirmed by the visitors; that the architects have permission to make certain alterations proposed by them in the spires, &c.,

as shewn in the tracing marked B., such alterations being first submitted to and approved by the commissioners in lunacy, and their approval notified by their secretary to the clerk to the visitors; and that the clerk be authorised, when the working drawings were completed, to advertise in *The Times*, *The Builder*, *The Cambridge Chronicle*, and the *Cambridge Independent Press*, for tenders for the erection of the asylum,—the form of advertisement being first submitted to the sub-committee for general building purposes.”

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At this meeting, the plaintiff, Mr. Kendall, was desired by the committee to proceed with the working drawings, which he accordingly did.

On the 21st of May, 1852, the defendant, as clerk, reported to the committee at their meeting, that the financial report of the visitors had been confirmed, and the plans and estimates approved by the justices for the county and Isle, and by the council of the borough, and orders made by them respectively authorising the visitors to expend a sum, not exceeding the sum of 30,000*l.*, for the purposes mentioned in the report. No rates, however, were ever made or collected for raising this sum; and the orders were in fact rescinded in April, 1854.

At the end of May, 1852, the plaintiffs had completed the working drawings ordered; and, at a meeting of the committee, held on the 4th of June, the defendant, as clerk, reported that the same were completed. The defendant, as clerk, also submitted to the committee at this meeting the following form of advertisement, for consideration and approval of the visitors:—

“ Cambridge, Isle of Ely, and Borough of Cambridge Lunatic Asylum.

“ To builders.

“ Persons willing to contract for sundry works proposed to be done in erecting a pauper lunatic asylum for the county of Cambridge, Isle of Ely, and borough of

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Cambridge, on a plot of ground selected for that purpose in the parish of Fulbourne, about three miles from Cambridge, abutting upon the railway from Cambridge to Newmarket, are requested to send in tenders, sealed up and indorsed 'Tenders for County Lunatic Asylum,' to my office at Cambridge, on or before the 30th day of June instant, after which time no tender will be received. The works to be done under the direction of the committee of visitors and their architects, or other person appointed by them, agreeably to the plans, specifications, and conditions, which may be inspected at the office of the architects, 33, Brunswick Square, London, and 4, King's Parade, Cambridge, on any day after the 19th day of June instant, between the hours of 10 A. M. and 6 P. M. The committee will not be pledged to accept the lowest or any tender; and the contractor will be required to enter into a contract, and give a bond, with a surety, to be approved by the committee, in the sum of 5000*l.*, for the due performance of the contract. The quantities can be obtained of Mr. Thomas Percy, surveyor, of No. 1, Alfred Place, Bedford Square, London; and the usual charges of such surveyor are to be paid by the contractor whose tender may be accepted.

" By order of the committee of visitors,

" David King, clerk.

" Cambridge, 4th June, 1852."

On the 5th of June, 1852, this advertisement was published in *The Times* and other newspapers.

On the 16th of July, 1852, at a meeting of the committee of visitors, the defendant, as clerk, reported that he had caused the advertisement for tenders to be inserted in the newspapers.

He also produced tenders for the erection of the asylum from several builders, and reported, that, "although the design of Messrs. Kendall, Pope, & Edlin had been accepted and approved, no architect had been

appointed to carry out the works comprised in such design."

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Whereupon, it was proposed by The Rev. J. Fendall, seconded by The Rev. J. E. Fordham, and carried unanimously, "That Messrs. Kendall, Pope, & Edlin be the architects to carry out the works proposed to be executed under the accepted plans, provided a sufficiently low tender could be obtained."

The tenders were then opened, and the following resolution was afterwards come to:—

"That, as all the tenders were considerably above the amount the visitors were authorised to expend, neither of them should be accepted; but that the visitors should, if necessary, apply to the several courts of quarter sessions and town-council, for their sanction to an additional outlay."

On the 8th of September, 1852, the plaintiff, Mr. Kendall, wrote to the committee, explaining, as the fact was, that the difference between the tenders sent in and his original estimate, was owing to the great rise in the prices of materials and labour since the date of his estimate: and this letter was read to the committee by the defendant, at a meeting of the visitors held on the 8th of October, 1852; and the further consideration of the proceedings of the visitors with reference to the erection of the asylum was resolved by the committee to be postponed for six months.

Other meetings of the committee subsequently took place, at which no definite resolution was come to in respect to the erection of the asylum; but the further consideration of the plaintiffs' plan was postponed: and, on the 13th of September, 1853, at a meeting of the committee, it was resolved that the clerk should immediately apply to Messrs. Kendall & Co., requesting that they would at once forward an account of all expenses incurred by them up to that date, and the total

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amount of their claim against the visitors, in the event of their plan being given up.

The defendant, as clerk, wrote to the plaintiffs in pursuance of this resolution; and the plaintiffs accordingly sent in their claim to the committee, being 157*l.* 10*s.* for the premium, and 891*l.* 5*s.* for commission at the rate of 2½ per cent. on the lowest tender sent in for the erection of the proposed asylum, and travelling expenses.

The committee did not further employ the plaintiffs in the matter. The plaintiffs are entitled to be paid the premium of 157*l.* 10*s.* referred to in the first count of the declaration, and which has in fact been paid in pursuance of the order of reference; and they are entitled to be paid the sum of 498*l.* 15*s.* in respect of the work done by them as mentioned in the case subsequently to the sending in and approval of the competition plans.

The real question is, by what form of proceeding, and against what parties, the above sums can be recovered.

The court is at liberty to draw any inferences of fact which a jury might properly draw from the circumstances stated in the case.

The question for the opinion of the court, is,—whether this action is maintainable. If the court shall be of opinion that it is maintainable, judgment is to be entered for the plaintiffs for the sum of 498*l.* 15*s.*, with costs of suit. If the court shall be of a contrary opinion, judgment of nonsuit is to be entered: And the court is, in the last-named event, requested, in pursuance of the order of reference, to say what, and against whom, is the proper remedy for the plaintiffs to recover the sums due to them.

Phipson (with whom was *Bovill*), for the plaintiffs. (*a*)

(*a*) The points marked for argument on the part of the plaintiffs, were,—

“That the action is maintainable, for the following (amongst other) reasons:—

[*Jervis*, C. J. What right have the parties to call upon the court to say who is liable if the defendants are not? And what right has the court to say that a given individual is liable, without hearing him? We can only deal with the parties who are before us.] The only question which the court is substantially called upon to determine, is, whether or not this action lies. How the amount is to be recovered, if the court hold that the action will lie, is a matter for future consideration. It is submitted that the action lies in the form in which it brought. It is brought upon an express contract, and also upon an implied contract, for work expressly ordered by the committee of visitors. The statute in force at the time the contract in question was made, was the 8 & 9 Vict. c. 126, which was repealed in August, 1853, by the 16 & 17 Vict. c. 97, except as to existing contracts, &c. The whole of the work in respect of which the plaintiffs seek to recover in this action, was done whilst the former act was in operation: but, so far as

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That the committee of visitors gave orders to the plaintiffs for work which the arbitrator has found to have been performed under such orders to the value of 498*l.* 15*s.*: That the committee had power, under the 17th section of the 8 & 9 Vict. c. 126, to give such orders: That they are liable, in their collective capacity as a committee of visitors, upon such contracts; and may be sued upon them in the name of their clerk: That the circumstance that the committee was not, during the whole of the period mentioned in the case, composed of the same individuals, is immaterial; and that the power of suing the clerk for

the time being is given by the legislature, to obviate any difficulty arising to creditors from that circumstance: That the circumstance that the committee have not at present raised funds to satisfy the plaintiffs' claim, is no bar to an action upon the contract: That an action upon the contracts entered into by the committee, is the proper course to establish the fact of such contracts, and the amount of the liability; and that the plaintiffs are entitled to judgment in this action, independently of any question as to what may be their course to realize its amount."

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sued in name of
their clerk.

To make con-
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regards the present question, there is no substantial difference between the two acts. The 2nd section of the 8 & 9 Vict. c. 126, impowers the justices of every county and borough not having a lunatic asylum, to provide one. By s. 2, they are to give notice of their intention to appoint a committee to superintend the providing of an asylum; and provision is made by s. 4 for the appointment of such committee. The 12th section provides for the election of a "committee of visitors," who, by s. 14, are directed to appoint "a clerk to such visitors for the purposes of the act." The 16th section enacts that "*that every committee of visitors may sue and be sued in the name of their clerk*; and that no action which may be brought or commenced by or against any such committee of visitors in the name of their clerk, shall abate or be discontinued by the death or removal of such clerk, but the clerk for the time being to the visitors shall always be deemed plaintiff or defendant in such action, as the case shall be." The 17th section enacts "that the committee of visitors for any county or borough, counties or boroughs, for which an asylum or an additional asylum, or additional accommodation for pauper lunatics shall for the time being be required, shall, subject as hereinafter mentioned, procure, examine, and determine on plans and estimates, and contract for the purchase of lands and buildings (and, in the case of buildings, either with or without any fittings up and furniture belonging thereto), and for building, erecting, altering, improving, restoring, furnishing, and completing an asylum or additional asylum, or additional accommodation, for the pauper lunatics of the county or borough, counties or boroughs, for which such visitors, or such of them as shall not be elected by subscribers as aforesaid, shall be appointed, or for those of the same pauper lunatics for whom there shall not be proper accommodation in any existing asylum, or, with the

consent of the poor law commissioners, and the guardians or overseers of the parish or union, for adapting any workhouse for all or any of the same lunatics who may be chronic lunatics ; and, subject as aforesaid, shall also contract for making, laying out, and completing the yards, courts, outlets, grounds, lands, and appurtenances to such asylum or additional asylum or workhouse, and also from time to time to purchase any land or buildings for the purpose of enlarging or improving any such asylum, workhouse, or the yards, &c., and appurtenances thereto ; and every contractor shall give to the clerk to such visitors sufficient security for the due performance of the contract ; and every such contract, and all orders relating thereto, shall be entered in a book to be kept by the clerk to such visitors ; and, when such asylum or workhouse and appurtenances, or (as the case may be) the additions to or alterations thereof, shall be declared to be completed, then such book shall be deposited and kept among the records of the county or borough, or, in the case of two or more counties or boroughs having united for the purposes of such contract, among the records of such one of the united counties or boroughs as shall have paid the largest proportion of the expenses of such contract ; and every such book may be inspected at all reasonable times by any person contributing to the rates of such county or counties, borough or boroughs respectively, and also, if any part of such expenses has been paid by voluntary subscriptions, by any of such voluntary subscribers ; and a copy of every such book shall be kept at the asylum or additional asylum which shall have been erected or provided ; and all lands and buildings so to be purchased as aforesaid shall be conveyed to such person or persons as the visitors by whom the same shall be purchased shall think fit, in trust for the purposes of this act : Provided always, that the said visitors shall from time to time make their report to the

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plans, &c., to
be submitted to
commissioners
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general or quarter sessions of the county or borough, counties or boroughs, for which they, or such of them as shall not have been elected by subscribers as aforesaid, shall be elected, of the several plans, estimates, contracts, and purchases which shall have been agreed upon, and of the sum or sums of money necessary to be raised and levied for defraying the purchase moneys and expenses thereof on the county or borough, or, in the case of two or more counties or boroughs having united for such purposes, on each or every of such counties or boroughs; which plans, estimates, contracts, and purchases shall be subject to the approbation of the court or courts of general or quarter sessions of such county or counties, and of the justices of such borough or boroughs, before the same shall be completed or carried into execution." The 18th section impowers the committee of visitors to purchase for the purposes of the act any buildings, &c., in consideration of a yearly rent-charge or annual payment; and s. 19 enacts "that it shall be lawful for any committee of visitors, instead of purchasing any buildings, lands, or hereditaments which they are thereby authorised to purchase, to take a lease thereof for any absolute term of not less than sixty years, at such annual rent and under such covenants as the said committee of visitors shall think fit." The 28th section enacts "that every committee of visitors shall submit all proposals and agreements for uniting counties and boroughs and other asylums for the purposes of this act, and all proposals for building or providing asylums, or the buildings, &c., or appurtenances thereto, or additional accommodation for pauper lunatics, and all contracts and all plans which may be intended to be adopted for such asylums, accommodation, and premises, to the commissioners in lunacy, who shall make such inquiries in reference thereto, and to the lunatics to be provided for, as they shall deem proper, and shall report thereon in

writing to one of Her Majesty's principal secretaries of state; and the estimates of the costs and expenses of carrying into execution such contracts for any of the purposes of this act, in reference to the purchase of land, or the building or providing any asylum or additional asylum or accommodation for pauper lunatics, shall be submitted to Her Majesty's said secretary of state; and no such proposals, agreements, contracts, estimates, or plans shall be accepted, executed, or carried into effect until the same shall be approved of by the said secretary of state, by writing under his hand and seal." The 33rd section,—which is an important one,—enacts, "that, in order to pay and defray the moneys, costs, and expenses which shall be or shall become payable by any county or borough for any of the purposes of this act, the justices of every such county, at any general or quarter sessions for the same, may and shall assess and tax a general county-rate or rates upon such county, and may and shall fix a sum or rate to be contributed by all places whatsoever within such county (other than any borough being within such county, or by this act for the purposes thereof annexed thereto), and whether such places shall or shall not be liable to contribute to an ordinary county-rate; and the council of every borough may and shall assess a general borough-rate in the nature of a county-rate upon such borough; and the said rates shall be collected, levied, and recovered in such manner, and by the same powers, authorities, ways, and means, and under the same penalties, as any ordinary rate for such county or borough respectively may by law be collected, levied, and recovered; and the moneys, costs, and expenses to be paid or contributed by any county or borough for the purposes of this act shall be paid by the treasurer of such county or borough, out of the rates aforesaid, to the treasurer of the asylum to which such county or borough shall, either alone or

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jointly, pay or contribute: Provided always, that it shall be lawful for the town-council of any borough, if they shall think fit, to direct that any moneys which shall become payable for the purposes of this act, or any part thereof, shall be paid out of the borough fund of such borough, and such moneys shall be paid by the treasurer of such borough out of such fund accordingly." [Cresswell, J. The difficulty here is, that there is neither asylum, nor treasurer, nor money.] That the committee of visitors made a contract which they were competent to make, is clear: and it is equally clear that the plaintiffs have done all that was required on their part to entitle them to the stipulated remuneration, inasmuch as their plans were selected by the committee, and approved of by the commissioners in lunacy and by the home secretary. [Cresswell, J. What will be the effect of a judgment for the plaintiffs?] It may be that it will be altogether ineffectual, except for the purpose of liquidating and ascertaining the amount which the plaintiffs are entitled to. They are clearly entitled to have that ascertained, although it may be doubtful whether they can enforce it. The power to contract, and the liability to be sued, could not have been idly introduced into the statute. [Cresswell, J. These committee-men are not a corporate body.] Neither are trustees under a turnpike-act; and yet, though a fluctuating body, they may be sued on contracts made by them, in the name of their clerk. The contract is not less a contract, because the contracting parties are not personally liable on it. The statute says the committee shall sue and be sued in the name of their clerk. For what are they to be sued? In respect of contracts which they enter into within the scope of their authority. The 19th section gives the committee power to take premises on lease, under such covenants as they shall think fit. The covenants in such case necessarily would be, for payment

of rent, to repair, &c. Is it to be said, that, though they may enter into such covenants, they cannot be sued for the breach of them? or that their liability is to be contingent only upon rates being made and collected and handed over to the treasurer? *Allen v. Waldegrave*, 8 Taunt. 566, 2 J. B. Moore, 621, is extremely like this case. There, an act of parliament impowered justices in quarter sessions assembled, or at any adjournment of the same, to build, or order to be built, a bridge, and enacted that they might contract for the building of the same, and that every contractor for such work should give sufficient security for the due performance of his contract to the clerk of the peace, and that the said justices at any general quarter session, or adjournment of the same, might appoint such of the said justices as they should think fit to superintend the building, &c. The expenses were to be provided for out of the county-rate; and it was enacted, that, in all actions or proceedings at law, the said justices *might* sue or be sued in the name of the clerk of the peace; and that no action should abate by the death of any such clerk, but that the clerk of the peace for the time being should always be deemed plaintiff, &c., defendant, or respondent, in all such actions, &c., or proceedings at law respectively; and it was provided that every such clerk of the peace should be reimbursed all damages, &c., and expenses which he should have paid, or be subject or liable to, on account thereof, out of the money to be raised by virtue of the act. The plaintiff covenanted with the defendants, who were the superintending justices, and were described in the indenture as the major part of the justices assembled at the general quarter sessions, to build the bridge; and the defendants covenanted that they, or the treasurer for the county, should pay him a certain sum by instalments. The plaintiff having declared in covenant against the

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defendants for the non-payment of two instalments,—this court held that they were not liable, and that the remedy given by the statute was against the clerk of the peace. That the committee, who contract on behalf of the public, and in performance of a public duty, are not personally liable, is clear,—*Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, 1 T. R. 674; *Tuck v. Ruggles*, 5 Esp. N. P. C. 237; per Dallas, C. J., in *Allen v. Waldegrave*, 8 Taunt, 574. [*Jervis*, C. J. The effect of these suing clauses was considered by the Exchequer Chamber in a recent case of *M'Kinnon v. Penson*, 9 Exch. 609 (a), where Coleridge, J., in giving the judgment of the court, says,—“The usual and proper operation of clauses such as that under consideration (b), is, not to give new rights of action, or create new liabilities, but only to substitute more convenient parties for those who would otherwise be liable or might have sued, either by common law or by statute.”] That may be true with reference to the subject-matter of the contract in that case; but it has very little application here. In *Emery v. Day*, 1 C. M. & R. 245, 4 Tyrwh. 695, where the action was brought against the clerk upon a contract entered into by the trustees under a local turnpike-act, Parke, B., repudiates the argument that the status of the parties had any operation upon the contract itself. He says: “The contract may be a general one,—to pay on request, although the plaintiff may not be able to enforce it, so as to recover the fruits of a judgment, for many years. In the case of a contract with a testator, where the executor has pleaded plenè administravit, and the plaintiff takes judgment of assets quando, he may have no fruits of that judgment for many years; still the action

(a) Affirming the judgment of the court of Exchequer, 8 Exch. 319.

(b) The 4th section of the General Highway Act, 13 G. 3, c. 78.

was maintainable immediately against the executor, although any execution is postponed." [Cresswell, J. If there had been no special clause here as to suing and being sued in the name of their clerk, would not an action have lain against the committee themselves?] It is apprehended it would not. [Jervis, C. J. If you get judgment here, why may you not levy on the clerk?] If the committee would not be personally liable, their clerk, who is a mere nominal party representing them, clearly cannot be. In *Wormwell v. Hailstone*, 6 Bingh. 668, 4 M. & P. 512, which was an action against the clerk of the trustees of a turnpike-road, under a statute which permitted the trustees to sue and be sued in the name of their clerk, it was held that execution could not issue against the clerk personally. In giving judgment in that case, Tindal, C. J., says: "It is asked, how are the debt or damages to be recovered in this action, if the clerk is not liable? This act, undoubtedly, makes no direct provision, as many others of a similar nature do, upon this subject. See the West India Dock Act, 39 G. 3, c. 69, s. 184, and the London Dock Act, 39 & 40 G. 3, c. 4, s. 150. But there can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a mandamus or a bill in equity. It is sufficient, however, for the present application, to decide that we think the act does not authorise a personal execution against the clerk." [Williams, J. The 74th section of the general turnpike act, 3 G. 4, c. 126, contained a proviso for indemnifying the clerk and others "out of the moneys belonging to the turnpike-roads for which he or they should act, all such costs, charges, and expenses as he or they should be put unto or become chargeable with, or be liable to, by reason of his or their being so made plaintiff or defendant."] *Wormwell v. Hailstone*

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1856. is confirmed by *Emery v. Day*. The Public Health Act, 11 & 12 Vict. c. 63, which creates local boards of health for particular districts, by s. 85 impowers the local board to enter into such contracts as are necessary for carrying the act into execution ; and the contract, when exceeding 10*l.*, is to be under the common seal of the board, and to specify the work, price, &c. ; and every contract so entered into is to be binding upon the board : by s. 86, the expenses incurred or to be incurred by the local board for works done under the act, are to be paid by a rate levied in the district benefited or to be benefited thereby : by s. 87, a separate account is to be kept, to be called the "district fund account," to be applied to carrying the act into execution : and by s. 140, it is declared that persons acting in the execution of the act are not to be personally liable : it was held, in *Nowell v. The Mayor &c. of Worcester*, 9 Exch. 457, that an action lay against the corporation upon a contract entered into by them by deed, for non-payment of the sum thereby agreed to be paid, and that the plaintiffs were not driven to seek their remedy by mandamus or bill in equity, or by any such collateral proceeding. [*Cresswell*, J. Follow that out, and it would shew these committee-men to be personally liable.] This point underwent some discussion in *Moffatt v. Dickson*, antè, Vol. XIII, p. 562, 571, 572 : but there was no decision upon it. In *The King v. The St. Katherine Dock Company*, 4 B. & Ad. 360, the performance of an award was enforced by mandamus.

Ogle (with whom was *Byles*, Serjt.), contrà. (a) The

(a) The points marked for argument on the part of the defendant, were as follows :—

"That the defendant, as clerk to the visitors, can only be sued for such causes of action as can be maintained against the visitors for the time being ; that, as the duties imposed upon the visitors under the circumstances stated in this special case are compul-

contract was not a contract to pay for the plans, &c., on request, but to pay in the manner provided by the act of parliament, that is, when the treasurer should have handed the committee funds sufficient for the purpose. The plaintiffs should have waited until there were funds, and then have sued the committee of visitors, by their clerk, in case, as was done in *Cane v. Chapman*, 5 Ad. & E. 647, 1 N. & P. 104. By the 42nd section of the 8 & 9 Vict. c. 126, the visitors were to appoint a chaplain and other officers: since the case of *Bogg v. Pearse*, ante, Vol. X, p. 534, it will hardly be contended that the visitors would be liable to be sued for their salaries. In that case, the court held, that indebitatus assumpsit will not lie against commissioners under a local paving-act, for salary of officers whom the act authorises them to appoint at a salary *to be paid out of the rates to be raised thereunder*,—the proper remedy being either by an action upon the case, or a mandamus. *In *Story on Agency*, § 302, it is laid down, that, “in the ordinary course of things, an agent, contracting on behalf of government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature.” (a) The

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sory, and were undertaken by them solely for the benefit of the public, such visitors are not liable to be sued for a breach of the same, in an action either of debt or assumpsit; and that, at all events, the visitors for the time being cannot be made responsible in either of these forms of action, for liabilities contracted by former visitors, such visitors being a fluctuating body, and having been annually elected, as required by the statutes

8 & 9 Vict. c. 126, and 16 & 17 Vict. c. 97.”

(a) The authorities referred to for this, are,—*Macbeath v. Haldimand*, 1 T. R. 172; *Bowen v. Morris*, 2 Taunt. 374, 387; *Unwin v. Wolesley*, 1 T. R. 674; *Brown v. Austin*, 1 Mass. R. 208; *Dawes v. Jackson*, 9 Mass. R. 490; *Walker v. Swartwout*, 12 John. R. 444; 2 Liverm. on Agency, 269—280 (edit. 1818); 3 Chitty on Comm. & Manuf. 213, 214; Paley on Agency (by Lloyd),

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judgment of Jervis, C. J., in *Addison v. The Mayor of Preston*, antè, Vol. XII, p. 108, 133, is also strongly in favour of the defendant. [Crowder, J. Suppose the plaintiffs here had failed to do something on their part which the contract required them to do,—could the clerk to the visitors have maintained an action against them?] The fact that he could not, would not advance the plaintiffs' argument here. Many cases might be suggested where the mutual right to sue does not exist: take, for instance, the case of a female infant; she may sue for a breach of promise of marriage, though she could not be sued. Burrough, J., in *Allen v. Waldegrave*, 2 J. B. Moore, 629, says: "The contract in question, and on which this action was brought, was made by the defendants and Lord St. John as the major part of the justices of the peace at the general quarter sessions for the county of Bedford. It is, in fact, therefore, an act of the sessions, and the contract may be considered as made in the name of such sessions. It would be most unjust to make these defendants individually liable, which they must be, if this action were maintainable: but, on general principles, I do not think the action could be sustained against them, for, it is no consequence whether they contracted with the plaintiff by parol or deed; as they might be considered as treating with him on account of the public at large." Even if the court should think the committee not exonerated from liability by their character of compulsory agents for the public, they cannot be liable to be sued until they are

376, 377; *Bainbridge v. Downie*, 9 Mass. R. 253; *Fox v. Drake*, 8 Cowen, R. 191; *Oshorne v. Kerr*, 12 Wend. R. 177; *Jones v. La Tombe*, 3 Dall. 384; *Rathbone v. Budlong*, 15 John R. 1; *Mott v. Hicks*, 1 Cowen, R. 513; *Sheffield v. Watson*,

3 Caines, 69; *Bronson v. Woolsey*, 17 John. R. 46; *Hodgson v. Dexter*, 1 Cranch, R. 345, 363, 364; *Bernard v. Torrance*, 5 Gill. & John. R. 383; *Enloe v. Hall*, 1 Humph. Tenn. R. 303.

possessed of funds. Thus, in *Andrews v. Dally*, 4 Bingh. 566, 1 M. & P. 490, it was held, that, where the expenses of passing an act of parliament are directed by the act to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party who sues for the expenses of soliciting the act, to shew that tolls have been collected sufficient to cover his demand. The same principle was acted upon in *Pontet v. The Basingstoke Canal Company*, 4 Scott, 182, 3 N. C. 433, and in *Pardoe v. Price*, 11 M. & W. 427, and 16 M. & W. 451. *Smart v. The Guardians of the Poor of the West Ham Union*, 10 Exch. 867, also is an authority to shew that the plaintiffs' claim here is chargeable only upon the rates to be made under the act. (a)

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Phipson was heard in reply.

JERVIS, C. J. This is an important and a somewhat difficult question: but, upon the best consideration I have been able to give to it, I am of opinion, though, I must confess, not without some doubt, that the plaintiffs are entitled to the judgment of the court. I think it is plain that the legislature intended the visiting committee to contract on behalf of the county or borough, subject to the control of the justices, the lunacy commissioners, and the secretary of state. They were to have power to select the plans and drawings, and, subject to the approval of those several persons, to enter into contracts for carrying their selection into effect. It appears that the committee of visitors in the first place advertised for plans, and undertook to pay the successful competitor 150 guineas, with a condition, that, if the party sending in the plan which should be adopted, should be employed in the superintendence of the erection of the asylum, his remuneration for the

(a) See *Edwards v. Lowndes*, 1 Ellis & B. 81.

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plans, specifications, &c., should merge in the payment for such superintendence. Pursuant to this advertisement, the plaintiffs sent in plans which were approved of by the committee of visitors, and afterwards by the commissioners in lunacy and by the secretary of state; and so far there has been a compliance with the 17th section of the 8 & 9 Vict. c. 126. The question arising on the first count of the declaration is, whether there was a contract on the part of the committee of visitors to pay the plaintiffs for the work so done. That depends upon whether the committee were acting within the scope of their authority, and whether they have made the contract alleged, and whether they are liable to be sued. It appears to me that they were clearly acting within the scope of their authority. They were to procure plans. I think they necessarily had power to enter into a contract to pay for them. Then, was the contract they entered into, a mere engagement, as in *Moffatt v. Dickson*, that the architect should rely for his remuneration upon the chance of being ultimately employed to superintend the work, or was it an express promise that the work should be paid for absolutely at once. I think it was an express undertaking that the plans selected should be paid for, in the event of the party not being employed to superintend the erection of the building. That the committee were to have power to make contracts, is clear. The 19th section of the act contemplates that the committee may take premises on lease, with covenants incident to such hiring. But, though the committee of visitors may make contracts, it is plain, that, not being parties to the record, and there being no provision for a proceeding by scire facias, they cannot be personally liable thereon. The legislature, bearing in mind the difficulty of enforcing a remedy against a numerous and fluctuating body, by s. 16 provides for the institution of suits by and against them, by enabling the committee to sue and be sued in the name of their clerk.

And, though that provision is not intended to give a new or additional remedy where none existed before, but only to afford a more easy and efficacious means of enforcing a remedy which already existed, it seems to me to be strong to shew that the legislature intended that the remedy should be commensurate with the authority or power given to the committee to contract. The next question is, whether the committee are liable for the work done beyond the express written contract. If they were authorised to enter into a contract for plans and specifications, I think the next step was equally within the scope of their authority. In order to carry the plans into execution, and to obtain tenders for the work to be done, it was necessary to have the quantities taken out and the working drawings prepared. I think this was a thing they were authorised by the 17th section to contract for, and a thing not requiring the approval of any one. Upon the whole, it seems to me that the plaintiffs are entitled to judgment for the whole sum found by the arbitrator to be due.

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CRESSWELL, J. I am of the same opinion, although I am free to confess that the case is not without difficulties. *Wormwell v. Hailstone* is an instance of an action being held to be maintainable against a clerk to trustees; for, though the execution against the nominal defendant was set aside, the action was maintained. In *Andrews v. Dally* it was held that the action could not be maintained, not because no action would lie, but because a specific fund was provided to meet the claim. It is no answer, therefore, to say that the action will not lie, because the plaintiff cannot have execution. In general, if a man enters into a contract, and fails to fulfil it, he is liable to be sued. Here, the committee have made a contract with the plaintiffs; and they have failed to perform it. There being a difficulty in the way

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of suing a fluctuating body, the legislature have provided for that by enacting that this committee may sue and be sued in the name of its clerk. That gets rid of the technical difficulty. Then comes the question as to the nature of the contract,—whether it is an absolute contract to pay for the work at all events, or, as in *Moffatt v. Dickson*, conditional on the approval of the plans, &c., by those bodies or those persons whose approval was rendered necessary by the act of parliament. As to the first plans, the act of the committee of visitors was approved by the general body of justices (which, however, was immaterial), and by the commissioners in lunacy and the secretary of state. Then, as to the working drawings,—it occurred to me, on reading the proviso in the 17th section, that the persons who made those drawings must have done so upon the faith of that proviso. But the proviso does not say that the plans shall not be furnished upon the order of the committee of visitors; but merely that they shall not be carried into execution until the approbation of the sessions and justices is obtained. It is true, the drawings cannot be acted upon without the requisite sanctions: but they must be obtained; and the party who furnishes them has a right to sue for the price.

WILLIAMS, J. I am entirely of the same opinion. In modern times, an anomaly has been introduced into the law, viz. that persons acting as trustees, visiting justices, and the like, may contract, though not bodies corporate, without rendering themselves personally liable, and may sue and be sued in the name of their clerk or secretary. This, no doubt, leads to difficulties: but it has now become familiar; and it is perfectly well settled that judgments so recovered are not to be enforced otherwise than by mandamus, or by bill in equity. Can there be a doubt that the present case falls within the

law so settled? The committee of visitors here were clearly authorised to make contracts such as that declared on. It never could have been intended that they should be personally liable. The act provides, in s. 16, that the committee shall sue and be sued in the name of their clerk. There is, therefore, a class of cases in which the committee may be sued in the name of their clerk. I must confess I cannot conceive a case of that sort, if this is not one. I concur with my Lord and my Brother Cresswell in thinking that this was a contract which was authorised by the act, and may be enforced against those who made it by an action against them in the name of their clerk.

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CROWDER, J. The question is, whether or not the plaintiffs are entitled to maintain an action upon the contract set out in the declaration; or, in other words, whether the clerk is the proper person to be sued upon an express contract entered into by the committee of visitors. It appears to me,—indeed it was hardly disputed in the argument,—that the contract, so far as it related to the 150 guineas for the plans, was clearly within the authority conferred upon the visitors by the act of parliament. Nor was it denied that the working drawings were authorised to be ordered by the act. It seems to me that these are precisely the contracts in respect of which the clerk was intended by s. 16 to be sued. That clause was evidently inserted for the purpose of avoiding the difficulty of suing a fluctuating body. It has been contended, that, though the contract made by the visiting committee is within the scope of their authority, the clerk cannot be sued, because there are no funds raised out of which to satisfy the plaintiffs' claim. No authority, however, has been cited to shew that an action cannot be maintained because there are no funds. On the contrary, two cases have been re-

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ferred to,—*Wormwell v. Hailstone* and *Emery v. Day*, (though the latter is not an affirmative decision),—which shew that the action will lie. I agree with my Lord and my learned Brothers, that the plaintiffs are entitled to the judgment of the court.

Judgment for the plaintiffs.

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PARKER v. BACH.

An order of reference, with the appointment of an umpire, and two enlargements of the time for making the award, indorsed thereon, having been accidentally destroyed,—the court (on payment of costs) allowed a duplicate of the order, together with copies of the indorsements on the original, verified by affidavit to the best of the deponent's knowledge and belief, to be made a rule of court.

BY an order of Crowder, J., dated the 22nd of March, 1855, this cause was referred to the arbitration of Richard Clarke and Isaac Newey, or, in case of difference, of an umpire to be appointed by them by indorsement on the back of the order. The arbitrators duly appointed one William Fowler as umpire, who afterwards made his award.

Phipson, on a former day in this term, upon reading the *duplicate* of the order of Crowder, J., and an order of Willes, J., made on the 4th of September last, the affidavit of Richard Clarke, one of the arbitrators in the first-mentioned order mentioned, the affidavit of Henry Hawkes, and the affidavit of Thomas Smith James,—obtained a rule calling upon the defendant to shew cause why the said duplicate order and order respectively, and the several enlargements of the time for the arbitrators and umpire respectively making their award or umpirage, the first of such enlargements having been dated the 28th of May last, and signed by the said Richard Clarke and Isaac Newey, the said arbitrators, enlarging the time to the 1st of July last, and the other having been dated the 1st of July, and signed by the said Richard Clarke and Isaac Newey, the said arbitrators, and also by William Fowler, the umpire, further enlarging the

time to the 20th of August last, and also the appointment of the said William Fowler as such umpire as in the said affidavits, some or one of them, are mentioned, should not respectively be made a rule of this court.

Richard Clarke in his affidavit stated, that he was one of the arbitrators to whom the cause was referred ; that, in pursuance of the power given by the order of Crowder, J., of which a duplicate original was exhibited, the deponent and his co-arbitrator, Newey, by a memorandum dated the 28th of May last, indorsed upon the said order, and signed by himself and Newey, duly enlarged the time for making their award to the 1st of July last ; that, on the 1st of July, the deponent and Newey, and Fowler, the umpire, by a writing under their respective hands, indorsed upon the said order, duly extended the time for Fowler to make his umpirage to the 20th of August last ; and that the deponent then delivered the said original order of reference to the said William Fowler, as the umpire.

Hawkes in his affidavit stated, that he was present at the meeting of the arbitrators on the 22nd of May last ; that, at the said meeting, and before the arbitrators proceeded upon the reference, he handed to them the original order of reference (of which the paper writing marked "A," referred to in the affidavit of T. S. James, sworn in this cause on &c., was a duplicate original), for the purpose of their indorsing on such original order the appointment of an umpire to be chosen by them, as required by the said order ; after which, and before they commenced proceeding upon the reference, they chose (by a writing indorsed upon the said original order, and signed by them before they commenced proceeding upon the said reference,) and appointed William Fowler, of &c., to be the umpire between them, in case they should not agree in their award.

Thomas Smith James in his affidavit stated, that he

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was the attorney of William Fowler, the umpire appointed by Clarke and Newey; that, the arbitrators having disagreed as to their award, the decision of the matters in dispute duly devolved upon the said W. Fowler, as umpire; that, at the time the said order was handed to the deponent W. Fowler, there was indorsed thereon a memorandum in writing, dated the 1st of July, 1855, and signed by Clarke and Newey, and also by Fowler, whereby they duly extended the time for Fowler to make his umpirage, to the 20th of August last; that the said order was delivered to the deponent by Fowler, for the purpose of his preparing his award, in or about the month of September last, and, in clearing his table of waste-paper, after the deponent had received instructions from Fowler to prepare his award, he inadvertently threw the envelope containing the order into the fire, and the same was thereby destroyed, which circumstance he very shortly afterwards discovered; and that deponent verily believed that the paper writing then produced and shewn to him, and marked "A." was a duplicate original of the said order, he having very carefully read the said order, and the said memoranda indorsed thereon, while the same were in his possession as aforesaid.

The case of *Short v. Frank*, 3 Jurist, 341, was referred to.

Joyce now shewed cause. The rule asks too much. There can be no objection to the copy of the order of Mr. Justice Crowder being made a rule of court; but the rule seeks that the enlargements also may be made a rule of court, and yet no copy of such enlargements is verified by affidavit, or even produced. [*Jervis*, C. J. We cannot make mere matter of parol a rule of court. *Phipson*. The affidavits shew that the enlargements were duly made in writing; but, the order on which they were written being destroyed, it would be impos-

sible to give copies that could safely be sworn to be verbatim. *Jervis, C. J.* You might swear that the paper writing annexed is a true copy according to the best of your knowledge and belief, stating the circumstances.] The defendant is at all events entitled to the costs of the motion.

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JERVIS, C. J. Coming as he does with imperfect materials, the plaintiff must pay the costs of the rule, unless he is content to take it without the enlargements.

Phipson elected to take the rule *with* the enlargments.

Per Curiam. The rule then will be absolute to make the duplicate original and the enlargements a rule of court,—the plaintiff filing an affidavit verifying a copy the enlargements as suggested, and paying the costs of the application.

The rule was drawn up as follows:—Ordered, “that the plaintiff be at liberty to file in the office of the masters of this court copies of the several enlargements of the time for the arbitrators and umpire in this cause making their award or umpirage, and of the appointment of William Fowler as such umpire, as far as the same respectively can be given, verified by affidavit,—such affidavit to state the reasons why the same cannot be set out verbatim; and, upon the same (together with the said affidavit) being so filed as aforesaid, then it is ordered that the said enlargements and appointment respectively, together with the duplicate of an order made in this cause by Crowder, J., dated the 22nd of March last, and an order made in this cause by Willes, J., dated the 4th of September last, in the said rule mentioned, be respectively made a rule of this court,—the plaintiff to pay the costs of and occasioned by this application.”

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It is competent to an executor to assent to a bequest, though he never prove the will, provided letters of administration with the will annexed be afterwards taken out.

A rule for a new trial having, by mistake of counsel, been moved in the Queen's Bench instead of in this court,—the court permitted the motion to be renewed here after the expiration of the four days. (a)

JOHNSON v. WARWICK.

THIS was an action of ejectment to recover possession of a house at Wandsworth, in the county of Surrey.

At the trial before Wightman, J., at the last Summer Assizes for the county of Surrey, the following facts appeared in evidence:—In 1812, the premises sought to be recovered in this action were demised, with others, by one Bennett to one George Trossell, for a term of ninety-four years. George Trossell died in 1819, having bequeathed the term to his wife Sarah Trossell, who took possession of the premises, and allowed one Thomas Bywaters, who had married her only child, Elizabeth, to occupy them.

Sarah Trossell died in 1828, having by her will bequeathed the house in question to her daughter Elizabeth, and her son-in-law Thomas Bywaters, for and during the natural lives of the said Elizabeth Bywaters and Thomas Bywaters, and, from and after the death of the survivor of them, she gave the said house to their daughter Sarah Bywaters, to whom also she bequeathed the rest of the demised premises. Elizabeth Bywaters was also made residuary legatee and executrix.

Elizabeth Bywaters died in June, 1852, and Thomas Bywaters in 1853, having, with his wife, while she lived, occupied the house from the time of the death of Sarah Trossell until his own decease.

Thomas Bywaters by his will appointed the plaintiff his executrix; and she proved his will in June, 1853; and, in September in the same year, she also obtained letters of administration to Sarah Trossell with her will annexed.

(a) See the next case.

The plaintiff put in evidence the lease of 1812, probate of the will of George Trossell, and the letters of administration with the will annexed of Sarah Trossell.

Evidence was given on the part of the defendant, that Sarah Bywaters, the grand-daughter, married one Pound, under whom he claimed possession.

It also appeared that the will of Sarah Trossell had been concealed until the year 1850; and that, on its discovery, a correspondence took place between the solicitors of Pound, and Mr. and Mrs. Bywaters.

The learned judge submitted this correspondence to the jury as evidence of assent on the part of the executrix to the bequest; and, under his lordship's direction, the jury returned a verdict for the defendant.

Pearce, on the 8th of November last, pursuant to leave reserved to him at the trial, moved for a rule to shew cause why the verdict found for the defendant should not be set aside, and instead thereof a verdict entered for the plaintiff, on the ground that the assent to the bequest was inoperative, the assenting party not being competent, and never having been so, by reason of the will not having been proved. His excuse for not having moved within the first four days, was, that he had by mistake moved in the court of Queen's Bench and obtained a rule within the proper time, and the blunder was only discovered upon the rule being served upon the plaintiff's attorney, and returned by him. He cited *Piggott v. Kemp*, 2 Dowl. P. C. 20, where a motion was allowed under similar circumstances.

The rule was granted, subject to any objection on the ground of its being out of time.

Ogle, when the case was called on, objected that the rule was granted in direct contravention of the 50th rule of Hilary Term, 1853, which, being a statutory rule,

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1856. left the court no discretion. [*Jervis*, C. J. It has never been the practice to make objections of this sort. The rule was by inadvertence moved in the wrong court: no one was to blame but the learned counsel. Common courtesy requires that advantage should not be taken of such a slip.] At all events, this should not be drawn into a precedent. [*Cresswell*, J. I for one am very unwilling to suppose that my Lord and my learned Brothers at all exceeded their authority in allowing the rule to be moved under the peculiar circumstances: and I do not wish it to be understood that this should not be a precedent.]

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Shee, Serjt., and *Ogle*, now shewed cause. The assent to the bequest is clearly valid, although the will was never proved in the life-time of the executrix. In *Wentworth on Executors*, 14th edit. p. 82, it is said: "An executor before the will proved may give his assent, and it will stand good. Yea, although he die after any of these acts done, the will being never proved by him, yet do these acts so done stand firm and good, as I take it." And this is adopted in *Williams on Executors*, 4th edit. p. 240, 241, where the learned author also cites *Godolphin*, Pt. 2, c. 20, s. 1, and adds,—"It must, however, be carefully observed in this place, that, although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to shew the right to make the assignment or give the assent; which can only be effected by producing the probate or other evidence of the admission of the will in the spiritual court; for, as it has already appeared, the fact of a particular person having been appointed executor to another can be proved by no other means, either in courts of

law or equity. (a) *If the executor died after the assignment or assent, without having obtained probate, letters of administration cum testamento annexo must be produced instead.*" In *Brazier v. Hudson*, 8 Simons, 67, it was held, that, if an executor does an act, and dies without proving the will, the act will be valid if the will is ultimately proved. There, a term for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death, letters of administration, limited as to the term, were taken out to Hodgson: and the case was heard upon an exception to the master's report as to the title, the question being whether the administrator was the proper person to assign the term to a trustee for the purchaser. And the Vice-Chancellor (Sir L. Shadwell) said: "Lord Holt, in his judgment in *Wankford v. Wankford*, 1 Salk. 299, says that an act done by an executor is valid, provided the will is ultimately proved, although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate should be taken, should be considered as valid if the will is ever afterwards proved. The consequence is, that, upon letters of administration to Hodgson with his will annexed being taken out, the assignment to Baxter will be established." [Williams, J. In *Fenton v. Clegg*, 9 Exch. 680, the law was throughout assumed to be so. There, a testator bequeathed his leasehold cottages to his son, on trust to sell the same, and out of the proceeds to reimburse himself a sum borrowed by the testator, funeral expenses, and other payments, and, if any surplus, that to be divided between the testator's three children and his

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(a) See *Pinney v. Pinney*, 8 B. & C. 335, 2 M. & R. 436.

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grandchildren ; and the testator appointed his son sole executor. The son never proved the will : but, on the death of the testator in August, 1833, he took possession of the cottages, and continued to receive the rents up to the time of his death in March, 1839 ; and he disposed of the cottages by his will. In June, 1858, the grandchild of the testator obtained administration of his estate and effects with the will annexed, and brought ejectment to recover possession of the cottages : and it was held that there was sufficient evidence of an assent by the son to the bequest to himself, and consequently that he was entitled as legatee.]

Pearce, in support of the rule. Elizabeth and Thomas Bywaters having suppressed the will of Sarah Trossell, and having died without proving it, it was not competent to them to give any assent to the bequest. [*Williams*, J. All the authorities shew that an executor may give assent though he never prove the will ; provided administration be afterwards taken out, so that the court can read the will.] In *Doe d. Hornby v. Glenn*, 1 Ad. & E. 49. 3 N. & M. 837, a lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort. B., the brother, agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration : and it was held, that the agreement of B. as administrator de son tort, did not conclude him as rightful administrator, nor give a right of possession to the landlord, who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease. And Lord Denman said : "It would be very strong to hold that the lessor of the

plaintiff was bound after he became rightful administrator, by an act of this kind done by him while he was an administrator de son tort." [*Williams*, J. There is a mistake in the marginal note in 1 Ad. & E. 49, which has crept into the text-books: it is put as if it were necessary to make a personal claim.] In *Webster v. Johnson* (reported in the Weekly Reporter for 1854-5, p. 60),—which was an ejectment brought against the now plaintiff to recover the premises in question, the then plaintiff claiming as assignee of a mortgage executed by Pound, the husband of Sarah Bywaters, the testatrix's granddaughter,—it appeared that Thomas and Elizabeth Bywaters in the year 1828 took out letters of administration to the testatrix Sarah Trossell; and it was contended on the part of the plaintiff that there was evidence of assent by them to the bequest, for that, inasmuch as they were never administrators legally, any act done by them in that capacity was a nullity. But Lord Campbell, conceiving that there was no assent, nonsuited the plaintiff. Upon a rule to set aside the nonsuit, Coleridge, J. said: "The person who is supposed to have assented has suppressed the will and refused to give it validity, and has taken out letters of administration for the whole term. The term was bequeathed to her and her husband for their joint lives, and the survivor of them, remainder over to another; and the question is, whether her entry and occupation is to be considered as an assent to the legacy to herself. But I think that the entry was under the letters of administration; and therefore, to say that what was done was an assent, is, to my mind, exactly the contrary,—it is conclusive that there was no assent at all." And Lord Campbell said: "The question for us is, can this action be maintained? And I think it cannot, unless there be evidence of assent on the part of Elizabeth Bywaters, which I do not think there is, because the person that has the power to assent denies the will, and claims the whole, and enters and actually sells

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a part. How, then, can it be consistent with common sense to say that there is an assent? As it appears to me that there is no assent, I think that no ejectment upon this mortgage deed can be supported." [*Shee*, Serjt. The letters of administration granted to Thomas and Elizabeth Bywaters in 1828, were not in evidence in this case. (a)]

JERVIS, C. J. It appears to me that this rule must be discharged. It is admitted that Thomas and Elizabeth Bywaters assented to the bequest contained in Sarah Trossell's will. When that will was proved (as here it has been), the court has the legal optics through which to look at it. The case is perfectly plain and free from doubt.

CRESSWELL, J. I am of the same opinion. There is a finding of assent here. The only incompetency suggested, is, that there was no proof of the will at the time of the assent given. But that want is supplied by the administration with the will annexed. The form of the reservation in this case puts an end to the argument derived from the case of *Webster v. Johnson*.

WILLIAMS, J. To make the assent operative, all that is required, is, that the will should be proved at some time.

CROWDER, J., concurred.

Rule discharged.

(a) At the trial, the plaintiff attempted to put in evidence the letters of administration which had been granted to the Bywaters a few months after the death of Sarah Trossell, the testatrix. These letters had been recalled by the Ecclesiastical court prior to the grant of the letters of administration with the will (of Sarah Trossell) annexed, to the plaintiff. The learned judge, refused to admit them, treating the document as "non avenu."

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SANTÉ v. HICKS.

Jan. 17.

THIS was an action for the price of a horse, which was tried before the undersheriff of Middlesex on the 9th instant, when a verdict was found for the plaintiff for 12*l*.

A rule for a new trial in a cause tried before the sheriff cannot in any case be drawn up, unless there be an affidavit verifying the sheriff's notes, produced within the time allowed for moving.

Beasley, on the fourth day of this term, obtained a rule nisi for a new trial, on the ground of misdirection. But, the officer having declined to draw up the rule, for want of an affidavit verifying the undersheriff's notes, in accordance with the rule of Easter Term, 4 W. 4 (4 M. & Scott, 484), he now renewed his motion. [*Jervis*, C. J. You are now too late.] It is not necessary that the motion should be made upon the sheriff's notes, verified by affidavit, where the case is attended by counsel in the inferior court. It is so laid down in Archbold's Practice, 9th edit. (by Prentice), 396,—“If the motion be made by counsel engaged at the trial, the court will not require the production of the sheriff's notes, or an examined copy of them, upon the motion for the rule nisi;” and for this are cited the following cases,—*Barnet v. Glossop*, 3 Dowl. P. C. 625, *Flower v. Adams*, 8 Dowl. P. C. 292, and *Reynolds v. Stone*, 1 Dowl. N. S. 578.

JERVIS, C. J. Archbold goes on,—“But, if the rule nisi is granted, it must be drawn up on reading an affidavit verifying the notes, or a copy of them, as above.” You are bound to be fully prepared within the four days.

The rest of the court concurring,

Beasley took nothing. (a)

(a) See *Watkins v. Packman*, *antè*, Vol. XIV, p. 419.

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Jan. 22.

Upon a writ of trial before the undersheriff, the "record" may be withdrawn.

SHAW v. OWEN.

THIS was an action upon a promissory note. The cause being called on for trial before the undersheriff of Cardiganshire on the 20th of November last, the plaintiff's counsel, before the jury were sworn, applied to be allowed either to adjourn the trial or to withdraw the record, on the ground that certain papers and documents which he intended to use on the trial, and which had been sent from London by railway to Haverfordwest, had not arrived, as expected. The undersheriff, observing that he was commanded by the writ of trial to return the same to the court out of which it issued, on a given day, asked the plaintiff's counsel if he was prepared with any authority to warrant his complying with either application; and, upon that gentleman admitting that he was not prepared with any, the undersheriff refused to allow the record to be withdrawn, and the plaintiff was nonsuited.

Field now shewed cause. There is no analogy between a writ of trial and a record, properly so called. The former is the creature of the statute 3 & 4 W. 4, c. 42, s. 17, which enacts, that, "in any action depending in any of the superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff

of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, *and to return such writ, with the finding of the jury thereon indorsed, at a day certain*, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." [Jervis, C. J. According to my notion, the object of the statute was, to put the sheriff in every respect in the position of the judge at nisi prius. I do not see why the record should not be withdrawn. Crowder, J. The return is to be made only where the cause is tried.]

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Prentice, in support of his rule, referred to *Parker v. Clarke*, 18 Law Journ. Q. B. 252, where the refusal of the sheriff to deliver out the writ of trial to the successful party in order that he might make the proper entry of the verdict thereupon, was treated as the misprision of the officer of the court; and where Coleridge, J., said,—“The plaintiff relies on the words of 3 & 4 W. 4, c. 42, s. 17, which directs ‘the sheriff to return the writ, with the finding of the jury indorsed thereon,’ and he infers from it that the sheriff cannot part with the writ, but must himself return it to the court. It does not appear to me necessary to construe the words so literally, but that the same practice is allowable under them as is pursued on trials at the sittings or at the assizes. In each case, to make the return of the nisi prius record with an account of the proceedings there, is, in strictness, the duty of the officer of the court where the trial is had; but, in practice, the record is always delivered at the proper time to the successful party, and

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he indorses on it the postea, subject to revision by the officer or the judge if he departs from the minutes of the one or the notes of the other: so, here, I think the successful party is entitled to the care of the writ, and to put on it the statement analogous to the postea, subject to revision if he enter on it what is untrue." That case is a distinct authority to shew that there is no difference in principle between the writ of trial and the nisi prius record. [*Jervis*, C. J. It is the constant practice to move for costs of the day for not proceeding to trial in these cases.]

Field. The defendant should have the costs of this motion, as well as the costs of the day.

JERVIS, C. J. Not the costs of this motion, that having been occasioned by the mistake of the undersheriff. The rule will be made absolute without costs, the plaintiff paying the costs of the day.

The rest of the court concurring,

Rule absolute accordingly.

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SIM v. EDWARDS.

Jan. 26.

THIS was an action brought to recover 1000*l.* and interest claimed to be due from the defendant to the plaintiff under an award made in his favour by one W. C. Fooks, to whom it had been left to determine what was due from the defendant to the plaintiff upon a guarantee in respect of differences between the parties upon sales of shares in The Royal Swedish Railway Company, and as to the time and mode of payment.

The cause came on for trial at the sittings in London after last Trinity Term, when a verdict was taken for the plaintiff, by consent, claim 1038*l.* 5*s.*, costs 40*s.*, "to be reduced to such amount as J. Sadleir, on reference to him, should determine and award; he the said arbitrator taking into consideration only the non-delivery by the plaintiff of the charter and statutes of 1848, referred to by him in his petition, if it should appear that they, or either of them, had not been delivered by him to the defendant."

Mr. Sadleir had been selected as the referee in consequence of his knowledge of the circumstances connected with the transaction in question; and it was arranged between the parties that he should decide the matter upon written statements to be submitted to him on each side, without being attended by attorneys or counsel, unless he himself should desire it. Such written statements were accordingly sent by the respective parties to Mr. Sadleir; but he declined to act as arbitrator. Mr. Huddleston was thereupon, by a judge's order dated the 12th of June, 1855, appointed arbitrator in lieu of Mr. Sadleir.

Six meetings were held before the substituted arbitrator at which he was attended by counsel on both

Where a verdict is taken for the plaintiff for a given sum, subject to a reference to an arbitrator, who is to reduce it to such amount as he may think proper, and the arbitrator by a formal award directs the verdict to be reduced by a nominal sum, his determination, though in form an award, is in substance a certificate, and, consequently, the plaintiff is entitled to the expenses incurred before him, as costs in the cause.

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sides ; and, on the 28th of November last, he made an instrument in the form of an award, whereby, after reciting the order of nisi prius, and the order substituting him for Mr. Sadleir, he awarded as follows :—

“ Now, I, the said J. W. Huddleston, having taken upon myself the burthen of the said reference, and having duly weighed all the objections of the said parties, and also the proofs, vouchers, and documents which have been given in evidence before me, do hereby make and publish my award in writing of and concerning the matters above referred to me, in manner following, that is to say,—taking into consideration only the non-delivery by the plaintiff of the charter and statutes of 1848 referred to by him in his petition,—It appearing to me, the said arbitrator, that the said charter and statutes of 1848 have not nor have either of them been delivered by the plaintiff to the defendant, I award and adjudge that the verdict entered for the plaintiff be reduced to claim 1038*l.* 4*s.*, costs 40*s.* In witness,” &c.

The plaintiff accordingly entered up judgment, and proceeded to tax his costs, claiming as part of the costs in the cause the expenses attending the reference. On the part of the defendant, it was objected before the master that the plaintiff was not entitled to the costs of the reference. The master, however, decided that those costs fell into the general costs in the cause, on the ground that the award of the arbitrator was in the nature of a certificate only ; and the costs were taxed accordingly.

H. Lloyd, for the defendant, now moved for a rule to shew cause why the master should not be at liberty to review his taxation. He submitted, that, the order of reference making no provision for costs, and the arbitrator having made a formal award, and not a mere certificate, the plaintiff was not entitled to the costs of the proceedings before him. [*Jervis*, C. J., referred to *Tregoning v. Attenborough*, 7 Bingh. 733, 5 M. & P. 453.

There, in trover, a verdict was taken for the plaintiff for the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of nisi prius to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to the plaintiff. The arbitrator made a formal award, in which he found the amount of deterioration, and awarded a sum accordingly, but said nothing about costs. The prothonotary having allowed on taxation the expenses of witnesses attending the arbitrator, a motion was made for a review of the taxation. But Tindal C. J., said: "The costs of this reference were substantially costs in the cause. The verdict gave the plaintiff the full value of the goods, when, in case of the defendant, the plaintiff offered to take the goods again, upon allowance being made for any damage done to them while in the defendant's hands. It was clearly for the benefit of the defendant; and, upon his assenting, the arbitrator ascertained the amount of the damages. The costs of attending him were therefore costs in the cause." That case is somewhat different from this. The referee there was in truth performing the functions of the jury. Here, the subject of the reference was, the non-performance by the plaintiff of a condition precedent.

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JERVIS, C. J. By the order of reference, the arbitrator was simply to ascertain to what extent the verdict was to be reduced. He has directed the plaintiff's claim to be reduced by 1s. *Tregoning v. Attenborough* shews that we are to look to the substance of the thing. In substance, this is a mere certificate. The master, therefore, did quite right in allowing the plaintiff his costs.

The rest of the court concurring,

Rule refused.

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The court has no power to stay the proceedings in a second action of trespass, until the plaintiff has paid the costs of a former action for the same trespass, in which he had failed by reason of the want of a notice of action: and, *Semble*, that the rule as to staying proceedings till former costs are paid, is confined to ejectments.

DANVERS v. MORGAN.

THE plaintiff kept an oyster-stall at Paddington, and was in the habit of throwing his oyster-shells on a wharf belonging to the Grand Junction Railway Company. For this he was given into custody by the defendant, who was in the employ of the company, and afterwards brought (on bail) before a police-magistrate, who fined him 5s. He then brought an action of trespass and false imprisonment against the plaintiff, who pleaded,—first, not guilty,—secondly, the want of a notice of action pursuant to the Metropolitan police-act, 10 G. 4, c. 44, s. 41. At the trial, the judge told the jury, that, if the defendant *bonâ fide* believed he was acting in pursuance of the police-act in giving the plaintiff into custody, he was entitled to notice. The jury found that the defendant did *bonâ fide* believe he was acting in pursuance of the act, and accordingly a verdict was entered for the defendant on that issue, with liberty to the plaintiff to move, and upon the other issue the damages were assessed at 5*l*. In the following term, a rule for a new trial on the ground of misdirection was moved for, but refused, the court holding that the defendant was under the circumstances entitled to notice of action. The costs were afterwards taxed, and a balance found due to the defendant of 39*l*.

The plaintiff afterwards brought a second action, in this court, in respect of the same trespass, the costs of the former action remaining unpaid. The defendant thereupon took out a summons to shew cause why the proceedings in the second action should not be stayed until the costs of the former action were paid. The summons came on before Williams, J., and was dis-

missed, on the ground that the application was too late ; but the learned judge at the same time intimated an impression that the rule as to staying proceedings in a second action, the costs of a former action being unpaid, was confined to ejectment.

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J. Brown now moved for a rule to the same effect. There has, it is submitted, been no such delay as to disentitle the defendant to that which he seeks, inasmuch as the summons heard before Williams, J., was taken out on the 9th of January, the very day on which the allocatur was given ; until which time the defendant could not know whether any, or what, costs would be due to him. This case is peculiarly one for the interference of the court in the manner prayed. The 41st section of the Metropolitan police-act, 10 G. 4, c. 44, "for the protection of persons acting in the execution of the act," enacts "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise ; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action ; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon ; and no plaintiff shall recover in any action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court, after such action brought, by or on behalf of the defendant ; and, if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise,

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judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and, though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon." The court will not be carrying out the spirit of that section,—the object of which was to give the defendant an opportunity of tendering amends before action,—otherwise than by holding that a plaintiff shall not be permitted to bring a second action for the same cause, without previously paying the costs of a former abortive action. [*Jervis*, C. J. Of course you had notice of the second action,—did you tender amends?] That does not appear. When this matter was before the learned judge at Chambers, it was suggested, upon the authority of a passage in Archbold's Practice, 8th edit. Vol. 2, p. 1208 (a), that the court will not in general stay the proceedings, where the first action was not decided on the merits. For this Archbold cites *Pashley v. Poole*, 3 D. & R. 53: but that was an action for the recovery of a debt, and therefore clearly distinguishable. Abbott, C. J., said,—“The present is an action brought for the recovery of a debt. It is not an action complaining of a malicious arrest, prosecution, or trespass, in which cases the court might be disposed to compel a plaintiff to pay the costs of a first action, before he was allowed to proceed in the second. This is an action for a pecuniary demand, alleged to be due from the defendants to the plaintiff, and we should be very careful before we deprived a party *who has a debt owing to him*, of the right of proceeding

(a) See 9th edit., by Prentice, Vol. 2, p. 1298.

in his second action. If we saw clearly that he was proceeding in the second vexatiously, we should prevent him so doing until he paid the costs. But here it appears that the first action was non-prossed in consequence of the plaintiff's declaring against the defendants generally as trustees, instead of by name. He discovers the names of the trustees, and sees that there is no use in going on to trial, because, if a verdict was recovered, the judgment might be arrested. I see no reason, therefore, and I know of no authority for saying, that, in a case like this, we ought to compel the plaintiff to pay the costs of the first action before he is allowed to go on with the second." And Bayley, J., said,—
"There is no general rule by which a plaintiff is compelled to pay the costs of a first action, before he is suffered to proceed with the second. If that were a general rule, it might in many instances work injustice, for, the defendant might not be able to pay the costs, and the only means of paying them might be by recovering his debt."

JERVIS, C. J. I am of opinion that there is no ground for this motion. In general, the practice as to staying proceedings in a second action until the costs of a former action for the same cause are paid, is confined to ejectment, which has always been considered as peculiarly the creature of the court. The same rule does not apply to trespass. There may, it is true, be cases where the court would interfere in this way, as, for instance, where the second action is brought *oppressively and vexatiously*. It does not, however, appear that that is the case here.

The rest of the court concurring,

Rule refused.

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ROBERTS v. BRETT.

Jan. 22.

By indenture between A. and B., it was covenanted that A. should at his own expense procure a suitable vessel, and stow on board thereof a certain sub-marine telegraphic cable which was then at Morden's Wharf, East Greenwich, and rig, fit, and provision the ship with all proper and sufficient masts, &c., and provide and pay competent officers, crew, and workmen for laying down the cable, &c., and have the said ship fully

equipped in all respects and ready for sea, at the Nore, on or before the 15th of July then next, and would, as soon as the said ship should be ready for sea at the Nore as aforesaid, cause the same to proceed with the said cable on board to the Northern coast of Africa, and with all convenient dispatch proceed to lay down the said cable: and B. covenanted to pay a certain sum on certain specified days, &c.

In an action by A. against B. for breach of the covenants in this indenture, the declaration contained specific averments of the performance, or readiness by A. to perform all the stipulations on his part, except the ship's being at the Nore ready for sea by the 15th of July; and it also contained a general averment of performance of all things on his part to be performed to entitle him to a performance of the covenants on the part of the defendant.

The defendant (being under terms to plead issuably) pleaded several pleas, traversing every material allegation in the declaration,—amongst others, sixthly, “that the plaintiff did not have such ship or vessel, &c., fully equipped in all respects according to the terms and conditions of the said indenture, and ready for sea, at the Nore, on or before the 15th of July, 1855, according to the said indenture.”

The plaintiff having signed judgment, on the ground that some of the pleas were not issuable,—the Court held that the sixth plea was clearly not an issuable plea; but, some of the other pleas presenting a substantial defence, they set aside the judgment, upon terms.

THIS was an action of covenant. The declaration stated, that, by a certain indenture made between the plaintiff of the one part, and the defendant of the other part, and bearing date the 15th of May, 1855, the plaintiff, for the considerations therein mentioned, for himself, his executors and administrators, did covenant with the defendant, his executors and administrators, in manner following, that is to say, that he, the plaintiff, should and would at his own expense procure the “Cornwall” frigate, or some other suitable ship or vessel, and should and would (unless prevented by fire, tempest, or the Queen's enemies) stow or cause to be stowed on board the said ship or vessel the sub-marine telegraph cable, which was one hundred and fifty miles in length, or thereabouts, and was then at Morden's Wharf, East Greenwich, in the county of Kent, and in the said indenture afterwards, for the sake of distinction, called “The African and Sardinian Cable;” and also should

To put
on
cable

and would, at the like expense, unless prevented as aforesaid, rig, complete, fit out, and provide and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions; and also should and would, at the like expense, obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and also should and would, at the like expense (unless prevented as aforesaid), provide and place on board the said ship or vessel, to the satisfaction of the defendant, his executors and administrators, proper and sufficient breaks and rollers, in order that the said cable might be properly paid out; and should and would, to the extent of 600*l.*, pay the expense of insuring the said cable to the amount of 60,000*l.*; and should and would, at the like expense (unless prevented as aforesaid), if so required by the defendant, his executors or administrators, place on board from the said Morden's Wharf any further quantity of sub-marine telegraph cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require; and should and would (unless prevented as aforesaid) do and perform all the several acts therein mentioned to be performed by him the plaintiff, and have the said ship, fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th of July then next; and, further, that he, the plaintiff, should and would, as soon as the said ship or vessel should be ready for sea at the Nore (unless prevented as aforesaid), cause the same to proceed with the said cable or cables on board, as the case might be, to Cape Tabaque, on the Northern coast of Africa; and should and would, at such expense as aforesaid (unless prevented as aforesaid), with all convenient dispatch, proceed to pay out and lay down the

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To provision
and rig same.
Officers, crew,
and workmen,

breaks, rollers,
&c., to pay out
the cable.

To insure.

To take addi-
tional cable on
board, if re-
quired.

To be ready for
sea, and at the
Nore, by July
15, 1856.

To proceed
forthwith to
Cape Tabaque,

and lay down
cable.

1856.	said African and Sardinian Cable, from the said Cape
ROBERTS	Tabaque, or as near thereto as might be practicable, to
v.	the Cape Spartivento, in the Island of Sardinia, or as
BRETT.	near thereto as might be practicable; and should and
To provide steam-tugs, &c.	would, at his own expense, provide all steam-tugs and
To discharge the other cable.	other vessels necessary for laying down the said cable as
	last aforesaid; and also should and would (unless pre-
	vented as aforesaid), according to the directions in
	writing of the defendant, his executors or adminis-
	trators, discharge the other cable thereinbefore men-
	tioned either at Cape Spartivento or Cape Tabaque, as
	the defendant, his executors or administrators, should,
	by writing under his or their hand or hands, direct, and,
	if no such direction should be given, then at the said
To lay down the other cable.	Cape Tabaque; and should and would, with all con-
	venient speed after the said African and Sardinian Cable
	should have been laid down (unless prevented as afore-
	said), lay down the said other cable from and to such
	places and in such direction as the defendant, his exe-
	cutors or administrators, should by writing under his
	or their hands direct or require, and for such a sum of
	money as should be agreed upon between the plaintiff
	and the defendant, his executors or administrators, before
To provide tugs, &c.	the said ship or vessel should sail from the Nore; and
	should and would at the like expense provide all steam-
Penalty for de- fault.	tugs and other vessels necessary for so doing: That it
	was in and by the said indenture provided always, that,
	if the plaintiffs should (unless prevented as aforesaid)
	make default in having the said ship, with the said cable
	or cables on board, as the case might be, at the Nore,
	fully equipped and ready for sea, on or before the said
	15th day of July then next, the defendant, his heirs,
	executors, or administrators, should be at liberty to
	retain from any moneys payable by him or them under
	the covenants for that purpose thereafter contained, as
	and for liquidated damages in respect of such default,

the sum of 200*l.* per week, and after that rate for any period less than a week during which such default should continue; but the power of the defendant, his executors or administrators, to demand and enforce payment of the said sum by way of liquidated damages, and to deduct and retain the same as aforesaid, should be without prejudice to the rights of the defendant, his executors or administrators, to exercise any other powers or remedies which the defendant, his executors or administrators, should possess or be entitled to, either at law or in equity, by virtue of these presents, or the bond thereafter referred to, for enforcing the completion of the works thereinbefore covenanted to be done, or for indemnifying and compensating himself or themselves for the damage or injury occasioned to him or them by reason of such default: That, by the said indenture, for the consideration therein mentioned, the defendant further, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, his executors and administrators, in manner following, that is to say,—

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BRETT.

Defendant's
covenants.

To pay 5000*l.*

that he, the defendant, his heirs, executors, and administrators, should and would, subject to such rights of deduction therefrom as thereinbefore mentioned, pay the plaintiff, his executors and administrators, the sum of 5000*l.* sterling, by the instalments and at the times thereafter mentioned, that is to say, the sum of 1000*l.*, part thereof, on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000*l.*, further part thereof, on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000*l.*, the residue thereof, when and so soon as the said ship should put to sea from the Nore,—one half of such last-mentioned sum to be paid in cash, and the other half thereof by the defendant, his executors or

<p>1856.</p> <hr/> <p>ROBERTS v. BRETT.</p> <p>To deliver cer- tain shares to plaintiff.</p> <p>To pay a sum to be agreed upon, for lay- ing down the other cable.</p> <p>Plaintiff and defendant to give bonds.</p>	<p>administrators, accepting a bill of exchange at three months' date, to be drawn upon him or them by the plaintiff, his executors or administrators; and, further, that he, the defendant, should and would, on or before the expiration of twenty-one days from the time when the said Sardinian and African Cable should have been so laid down as aforesaid, deliver or cause to be delivered to the plaintiff, his executors or administrators, or his or their nominee or nominees, five hundred paid up shares in the said Mediterranean Submarine Electric Telegraph Company, of 10<i>l.</i> each; and, further, that he, the defendant, his executors or administrators, if he or they should require the plaintiff to lay down the said other cable as aforesaid, should and would pay to the plaintiff, his executors or administrators, the sum which might be so agreed upon as aforesaid for his so doing, on or before the expiration of twenty-one days from the time of the said last-mentioned cable having been so laid down: And it was thereby further agreed and declared, that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under those presents, the plaintiff and two responsible sureties should, within ten days from the execution of those presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5000<i>l.</i>, and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of those presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000<i>l.</i>; and it was in and by the said indenture provided always, and thereby expressly agreed and declared, that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff, his</p>
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heirs, executors, and administrators, and of the defendant, his heirs, executors, or administrators, under or by virtue of those presents: Averment, that, after the making of the said indenture, and whilst the same was in full force and effect, he the plaintiff did forthwith, at his own expense, procure a suitable ship or vessel within the terms and meaning of the said contract in that behalf, and placed the same alongside the said Morden's Wharf, ready to take on board the said African and Sardinian cable, and did, at his like expense, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions, and was also ready and willing, at the like expense, to obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating the said ship or vessel, and workmen and others to assist in laying down the said cable; and did, at his like expense, provide proper breaks and rollers, in order that the said cable might be properly payed out; and was always ready and willing to place the same on board the said ship, to the reasonable satisfaction of the defendant in that behalf; and was always ready and willing, to the said extent of 600*l.*, to pay the expense of insuring the said cable to the amount of 60,000*l.*; and was always ready and willing, at his like expense, if so required by the defendant, his executors or administrators, to place on board, from the said Morden's Wharf, any further quantity of sub-marine telegraph cable, not exceeding in weight forty tons, which the defendant, his executors or administrators, should require; and was also always ready and willing to do and perform all the several acts thereinbefore covenanted to be performed by him, the plaintiff, and to have the said ship fully equipped in all respects, and ready for sea, at the Nore, on or before the said 15th of July then next: that he was always

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 Averment of
 performance by
 plaintiff.

1856.	ready and willing to receive the said African and Sardinian cable, and to cause the same to be stowed on board the said ship upon the terms of the said contract, and to proceed with the same and the said other cable to Cape Tabaque aforesaid, and, with all convenient dispatch, to proceed to pay out and lay down the same according to the terms of the said contract, and in other respects fully to perform and carry out the same on his part and behalf: and that he had performed and fulfilled all conditions precedent on his part to be performed and fulfilled, and every thing had taken place and happened to entitle the plaintiff to a performance by the defendant of the said indenture and all the said conditions, covenants, and stipulations therein contained on his the defendant's part to be performed and fulfilled,—
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General averment.	
Notice.	of all which several premises the defendant always had full knowledge and notice, and was from time to time requested by the plaintiff to stow on board the said ship the said cable, on the terms and for the purposes aforesaid, and also to inspect the said breaks and rollers so provided by the plaintiff as aforesaid, for the doing and accomplishing of all which several matters and things a reasonable time had elapsed before the commencement of this action: Breach, that the defendant did not nor would stow or allow to be stowed on board the said ship the said African and Sardinian cable and the said other cable, or either of them, or any part thereof, but wholly refused so to do, and therein made default; and did not nor would pay to the plaintiff the said sum of 5000 <i>l.</i> , or any part thereof, or pay to the plaintiff any moneys whatsoever on account of the said contract; and that the defendant did not nor would deliver or cause to be delivered to the plaintiff, or his nominee or nominees, the said five hundred paid up shares in the said Mediterranean Submarine Electric Telegraph Company, of 10 <i>l.</i> each, or any of them; and that the defendant did not
Breach.	

nor would,—although he did, before the commencement of this suit, require the plaintiff to lay down the said other cable, and a certain sum, to wit, 2000*l.*, was then agreed upon between the plaintiff and the defendant to be the sum to be paid by the defendant to the plaintiff for laying down the said other cable,—pay the said sum of 2000*l.* to the plaintiff, or any part thereof, according to his said covenant in that behalf, and the said several sums of 5000*l.* and 2000*l.* remained respectively due and unpaid to the plaintiff, and the said five hundred shares remained and were not delivered to the plaintiff, or his nominee or nominees; and that, whilst the said ship was so lying alongside the said Morden's Wharf as aforesaid, the defendant caused the said African and Sardinian cable to be stowed on board a certain ship or vessel other than the plaintiff's, and thereby broke the said contract with the plaintiff, and thereby discharged, prevented, and hindered the plaintiff from fully and completely performing the same on his part. The Special damage.

declaration then alleged for special damage, that, for the purposes of the said contract, the plaintiff chartered the said ship, and, by reason of the several premises, he incurred large expenses and liabilities in respect of such ship, and incidental to the chartering of the same, and he also, by reason of the premises, incurred other large expenses in procuring the said ship, and also other ships or vessels, and in having the same surveyed and insured and otherwise fitted for the said purposes; and he also, by reason of the premises, incurred other large expenses in equipping, provisioning, preparing, and otherwise fitting out the same, and in brokerage, and in procuring and providing the said breaks and rollers, and otherwise, and in insuring the said African and Sardinian cable; and thereby, and by reason of the premises, the plaintiff had incurred all the aforesaid expenses to no use, and the said ship and the said breaks and rollers still

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respectively remained on the hands of the plaintiff, wholly useless and unprofitable to him: and thereby also, and by reason of the premises, the plaintiff had lost and been deprived of all the profits that he would have gained from carrying out and completing the said contract; and he had also thereby lost favourable opportunities of bringing home profitable cargoes in the said ship, after completing his said undertaking; and thereby and by reason of the premises the plaintiff had been and was otherwise greatly damnified: And the plaintiff claimed 10,000*l*.

First plea.

To this declaration, the defendant,—being under terms to plead issuably,—pleaded, first, non est factum.

Second plea.

Secondly, that the plaintiff did not, at his own expense, procure the Cornwall frigate, or any other ship or vessel suitable for stowing and carrying on board thereof the said African and Sardinian cable in the declaration mentioned, and a further quantity of sub-marine telegraph cable not exceeding in weight forty tons, according to the said indenture.

Third plea.

Thirdly, that the plaintiff did not, at his like expense, rig, fit out, provide, and provision such ship or vessel as in the second plea mentioned, with all masts, rigging, ropes, spars, cables, anchors, ship's chandlery, and other stores and provisions proper and sufficient for such ship or vessel proceeding with and carrying on the said voyage by the said indenture contemplated, the said African and Sardinian cable and the said further quantity of sub-marine telegraphic cable not exceeding in weight forty tons as aforesaid, according to the said indenture.

Fourth plea.

Fourthly, that the plaintiff did not, at his like expense, obtain and provide officers and crew for such ship or vessel as in the second plea mentioned, competent and sufficient for the purpose of navigating such ship or vessel as aforesaid, with such cable or cables on board thereof as aforesaid, upon the voyage by the said inden-

ture contemplated, and workmen and others to assist in laying down the said cable, according to the said indenture.

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Fifth plea.

Fifthly, that the plaintiff did not provide and place on board such ship or vessel as in the second plea mentioned, to the satisfaction of the defendant, breaks and rollers proper and sufficient in order that the said African and Sardinian cable might be properly payed out, according to the said indenture.

Sixthly, that the plaintiff did not have such ship or vessel as in the second plea mentioned, fully equipped in all respects, according to the terms and conditions of the said indenture, and ready for sea, at the Nore, on or before the 15th day of July, 1855, according to the said indenture.

Sixth plea.

Seventhly, that the plaintiff did not, within ten days from the day of the execution of the said indenture (such ten days expiring before the 15th of July, 1855), or at any time, give and execute, nor did he, within such ten days, or at any time, procure two responsible persons as sureties on his behalf to give and execute, nor did two responsible persons as such sureties for the plaintiff, then, or at any time, give and execute to the defendant, his executors and administrators, a bond or bonds in the penal sum of 5000*l.*, for the true performance by the plaintiff of the other covenants by the plaintiff in the said indenture contained, and for securing any penalties which he might incur under the said indenture, according to the said indenture.

Seventh plea.

Eighthly, that the plaintiff was not ready and willing to receive the said African and Sardinian cable, and the said further quantity of submarine telegraphic cable, not exceeding in weight forty tons, and to cause the same to be stowed upon such ship or vessel as in the second plea mentioned, upon the terms of the said contract, and to proceed with the same to Cape Tabaque in the said

Eighth plea.

1856. indenture mentioned, and with all convenient dispatch to proceed to pay out and lay down the same, according to the terms of the said contract.
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- Ninth plea. Ninthly, that the defendant had not notice that the plaintiff had procured such ship or vessel as aforesaid, within the terms and meaning of the said indenture in that behalf, or had placed the same alongside the said Morden's Wharf ready to take in the said African and Sardinian cable, and had done and performed the other conditions precedent in that behalf in the declaration expressed and specified.
- Tenth plea. Tenthly, that, after the making of the contract contained in the said indenture, and before any breach thereof by him the defendant, the said contract, and all further performance thereof by the plaintiff and defendant respectively, was by mutual consent abandoned and given over, and they mutually discharged each other from any further or other performance thereof.
- The plaintiff having signed judgment, on the ground that some of these pleas were not issuable,

Hugh Hill, on former day in this term, obtained a rule nisi to set aside the judgment, for irregularity.

Byles, Serjt., and *Beasley*, now shewed cause. Signing judgment is the proper course, where a defendant under terms pleads any plea that is not issuable: *Capner v. Mincher*, 13 M. & W. 704. [*Williams*, J. If the question is whether any of the things to be done on the plaintiff's part are conditions precedent, this is a very inconvenient way of raising the matter for discussion.] If the question whether the pleas are issuable or not, be fairly arguable on demurrer, no doubt the plaintiff's proper course was, to demur. The fourth plea, however, is *clearly* non-issuable. It states that the plaintiff did not obtain and provide officers and crew competent and

sufficient for the purpose of navigating the ship, with the cable on board, upon the voyage by the indenture contemplated, and workmen to assist in laying down the cable. That can be no answer to a declaration charging the defendant with not having put the cable on board. It would be manifestly bad on general demurrer. The fifth plea is open to the same objection. Then, the sixth plea,—that the plaintiff did not have the vessel, fully equipped, *at the Nore*, on or before the 15th of July,—is palpably bad: the having the vessel at the Nore fully equipped was not a condition precedent to the plaintiff's right to call on the defendant to put the cable on board at Greenwich. The seventh plea is no better than the sixth. There is nothing in the covenant requiring the plaintiff to give a bond, to import that the giving of such bond was to be a condition precedent. Nor does it go to the whole cause of action. The tenth plea also is clearly bad: a covenant under seal can only be discharged or varied by an instrument of the like nature: *Rippinghall v. Lloyd*, 5 B. & Ad. 742.

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Hugh Hill and *H. Lloyd*, in support of the rule. The plaintiffs were not justified in taking upon themselves to sign judgment. In *The Thames Haven Dock and Railway Company v. Bromley*, 5 Exch. 496, a declaration in covenant by the assignees of B., a bankrupt, stated, that, by a deed between B. of the first part, D. and S. (his wife) of the second part, V. and the said B. (described as trustees) of the third part, and the Thames Haven Dock and Railway Company (the defendants) of the fourth part, after reciting that certain persons on behalf of the company had agreed to buy certain premises, and that B. had agreed to sell the same, it was witnessed, that, in consideration of a certain sum already paid to B., and in consideration of the further sum of 2936*l.* to be paid to B., and to V. and B., according to their re-

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spective rights and interest in the premises, on or before the 25th of March, 1844, B., D., S., and V. agreed to sell the premises; and that B. would, at his own expense, deduce a good title to the same; and that B. and all other necessary parties would, on or before the said 25th of March, on payment by the company of the said sum of 2936*l.*, at the costs and charges of the company execute and procure to be executed a proper conveyance for conveying the fee-simple of the premises; and that the company thereby agreed with B. that they would, on or before the said 25th of March, and on the execution of the said conveyance, pay the said sum of 2936*l.*, and, until payment of the said sum, would pay interest on the same to B. and his assigns; that the 25th of March had elapsed, and although B. before his bankruptcy, and the plaintiffs as his assignees after it, were willing and ready to deduce a good title, and though B. and the necessary parties were ready and willing, on payment by the defendants of the said sum of 2936*l.*, to execute a conveyance, and would have done so *but that the defendants discharged B. and the plaintiffs from deducing such good title, and from executing such conveyance.* The declaration then alleged as a breach, that the defendants did not prepare a proper conveyance, nor pay to B. or to the plaintiffs the sum of 2936*l.*, or any part thereof. And it was held, on error (affirming the judgment of the court of Exchequer, on special demurrer to the declaration), amongst other things, that the execution of the conveyance and the payment of the money were concurrent acts; but that the deduction of a good title by B. was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced; and that the averment that the defendants *discharged B. and the plaintiffs from deducing title*, though not alleged to have been *under seal*, was sufficient on general de-

murrer. None of these pleas are so clearly bad as to justify the plaintiff in taking the law into his own hands, and signing judgment. The general mode of alleging the performance of conditions precedent, introduced by the Common Law Procedure Act, 1852, throws considerable hardship on the defendant. A plea may be an issuable plea, even though it might be bad on demurrer. The sixth plea undoubtedly is the one which presents the greatest difficulty: but it is submitted, that, taking the whole of the covenants together, the fair meaning of the indenture was, that the vessel's being at the Nore, fully equipped for the particular service to which she was destined, by the 15th of July, was a condition precedent; for, it was important to the defendant to know that the ship was completely rigged and properly manned before he entrusted a cargo of such a valuable description on board of her.

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CRESSWELL, J. (a). The sixth plea is so clearly bad that I should have no hesitation in saying that the plaintiff would be entitled to judgment upon it. If it were not so, perhaps we should not think the others so clearly non-issuable as to justify the plaintiff in signing judgment. I think the defendant ought to be let in on terms.

The rest of the court concurring, the rule was made absolute, to set aside the judgment, on payment of costs, —the defendant to be at liberty to amend his pleas, upon payment of costs, within a week; the plaintiff not to be prejudiced in proceeding to trial at the sittings after term, and the defendant to be at liberty to draw up a rule for a special jury.

Rule accordingly. (b)

(a) *Jervis, C. J., was absent.* (b) *See Sully v. Frean, 10 Exch. 535.*

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HAYNE v. ROBERTSON.

An issue went down for trial, when an arrangement was made between the parties (under a rule of court), but through inadvertence the plaintiff did not ask for the costs of the issue :—The court refused to allow the rule to be amended in this respect in a subsequent term.

IN this case an issue had been directed to try whether, after certain moneys were originally advanced to the defendant by one Mrs. Hawkins to be invested, it was agreed between the said Mrs. Hawkins and the defendant that the same should be held on the defendant's security only, as a debt due from him personally, as for money lent or forborne to him,—*the costs of and occasioned by the application to the court to abide the event of the trial.*

The issue came on to be tried at the sittings at Westminster after last Trinity Term, when a compromise was effected, the defendant agreeing to pay a certain sum by instalments. This arrangement was embodied in a rule of court, but *no mention was made of the costs of the issue.*

Quain, for the plaintiff, now moved that the rule might be amended in this respect.

JERVIS, C. J. The court having once pronounced a rule in the terms which were arranged between the parties, it is not competent to them afterwards to introduce a term which was not stipulated for at the time the arrangement was made.

The rest of the court concurring,

Rule refused.

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LEGGO v. YOUNG and Another.

Jan. 31.

BY an order of reference under the compulsory power given by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3, "a cause" was referred, nothing being said about costs. The umpire, by his award, "adjudged that the defendants did pay to the plaintiff 159*l.* 0*s.* 9*d.* in full of all demands in the above-mentioned action," but said nothing about costs.

The court will not entertain a second application upon grounds which might and ought to have been brought forward upon the former occasion.

The master having declined to tax the plaintiff's costs upon this award, an application was made in Trinity Term last for the direction of the court, but the court declined to direct the master to tax the costs: *Leggo v. Young*, antè, Vol. XVI, p. 626.

T. Chambers (with whom was *Jacobs*) now moved for a rule calling upon the defendants to shew cause why the order of reference should not be amended, by making the costs abide the event of the award. [*Jervis*, C. J. Surely we cannot do that.] It was done in *Bell v. Postlethwaite*, 1 Jurist, N. S. 1167, where Lord Campbell said: "The master was right in refusing to tax the costs of the plaintiff, because the rule for referring the cause is silent respecting them. But we have power to reform the rule, that it may operate according to our own intention and the intention of the parties. We may insert a clause providing for the costs nunc pro tunc, and then the costs will follow according to the just and ordinary course of the law." [*Jervis*, C. J. This is substantially a renewal of the former application, upon amended materials, which cannot be: *Orchard v. Moxsy*, 2 Ellis & B. 206. The matter was very much discussed in this court in *Tilt v. Dickson*, antè, Vol. IV, p. 736, where all the principal authorities were cited. (a)] This

(a) See *Russell v. Hartley*, 415; *The Queen v. The Manchester and Leeds Railway* 7 Ad. & E. 522, n., 5 N. & M,

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application is a totally different one from the former. [*Jervis*, C. J. Substantially it is the same. You seek to amend the order, so as to enable you to get the costs. *Horn*, contrà. The application to *Cresswell*, J., at Chambers, was, to amend the order of reference: vide antè, Vol. XVI, p. 628. *Jervis*, C. J. In that case, the whole matter *ought* to have been brought before the court in last Trinity Term. We clearly cannot go into the matter again. You had it in your contemplation, before you came to the court on that occasion, to amend the order. With full knowledge of the facts, and all the materials before you, you abstain from asking us then to amend; and now you seek to vex the defendant with a second application. It cannot be allowed.] The court may amend the order, under the 96th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. [*Jervis*, C. J. That is open to the same answer. *Cresswell*, J. What does it signify whether the statute gives the power to amend, or the power were inherent in the court before the statute passed? This is not a technical objection.]

Byles, Serjt., who (with *Horn*) was instructed to shew cause in the first instance, observed that the case of *Bell v. Postlethwaite* was obviously distinguishable, inasmuch as there the arbitrator had by his award given the plaintiff costs, and, but for the amendment of the order, the award would have been bad; whereas, here, if the court granted the application, it would *make* the award bad.

Per Curiam.

Rule refused.

<p><i>Company</i>, 8 Ad. & E. 413, 1 P. & D. 164; <i>The King v. Orde</i>, 8 Ad. & E. 420; <i>Sherry v. Oke</i>, 3 Dowl. P. C. 349; <i>The Queen v. The Inhabitants of Barton</i>, 9 Dowl. P. C. 1021; <i>Shaw v. Perkin</i>, 1 Dowl. N. S. 306; <i>Ex parte Hasleham</i>, 1 Dowl.</p>	<p>N. S. 792; <i>Levy v. Coyle</i>, 2 Dowl. N. S. 932; <i>Dixon v. Oliphant</i>, 15 M. & W. 152; <i>The Queen v. The Great Western Railway Company</i>, 1 D. & L. 874; <i>Jones v. Hay</i>, 1 M. & G. 390, 1 Scott, N. R. 399; <i>The Queen v. Pickles</i>, 3 Q. B. 599.</p>
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MICHAEL v. TREDWIN.

Jan. 18.

THIS was an action upon a policy of insurance.

The first count of the declaration stated, that the plaintiff, on the 1st of May, 1852, caused to be made a policy of insurance containing (among other things) that he the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and caused himself and them and every of them to be insured, lost or not lost, *at and from the meridian of the day of sailing from Suez, to the meridian of the 20th day of March, 1853*, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the "Satisfaction," beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, upon the said ship &c., on ship, and so should continue and endure during her abode there, upon the said ship &c., and further until the said ship, with all her ordnance, &c., and goods and merchandizes whatsoever, should be arrived at as above, upon the said ship, &c., until she had moored at anchor twenty four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed; and that it should be lawful for the said ship, &c., in the said

To a declaration on a policy of insurance alleged to have been made on the 1st of May, 1852 "at and from the meridian of the day of sailing from Suez, to the meridian of the 20th of March, 1853,"—averring that afterwards the ship set sail and departed from Suez, and that the day of her so sailing from Suez was after the 20th of March, 1852, and before the 20th of March, 1853, and that, after the meridian of the said day of sailing from Suez, and before the meridian of the said 20th of March, 1853, the ship was by the perils of the seas wholly lost,—the defendant pleaded, "that the said ship was not, at the time of sailing from Suez, or at any

time on the day of sailing from Suez, or at any time afterwards during the continuance of the risk in the said policy of insurance mentioned, sea-worthy," &c. :—

Held,—on the authority of *Gibson v. Small*, 4 House of Lords Cases, 353,—that the plea was no answer to the action; the policy being in substance a time policy, and consequently there being no implied warranty that the vessel was sea-worthy on the day when the policy was intended to attach.

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voyage, to proceed and sail to, and touch and stay at, any ports and places whatsoever, and without prejudice to the said insurance: that the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and the assurers in the said policy, were and should be valued at 2400*l.*: that, touching the adventures and perils which they the assurers were contented to bear, and took upon them in the said voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage, of the said goods and merchandizes, and ship, &c., or any part thereof: that, by a memorandum thereunder written, it was mutually agreed that certain rules thereto annexed, not material to be set forth herein, should form part of the said policy,—of all which premises the defendant had notice; and thereupon, in consideration that the plaintiff, at the defendant's request, paid him a premium for the insurance of 1000*l.* upon the premises in the said policy mentioned, the defendant became an insurer to the plaintiff of the said sum of 1000*l.* and, by one J. Holman, his agent in that behalf, duly subscribed the said policy as such insurer upon the premises: Averment, that, at the time of the insurance, and from thence continually up to and at the time of the loss hereinafter mentioned, the plaintiff was interested in the said ship to the value and amount of all the monies by him ever insured or caused to be insured thereon; and that, *afterwards*, the said ship set sail and departed from Suez aforesaid, and that the day of her so sailing from Suez was after the 20th day of March 1852, and before the

20th day of March, 1853; and that, *after the meridian of the said day of sailing from Suez, and before the meridian of the said 20th day of March, 1853*, the said ship was, by the perils and dangers of the seas, wholly lost,—of all which premises the defendant had notice: yet the defendant did not pay the said sum of 1000*l.* &c.

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Fourth plea,—that the said ship was not, at the time of sailing from Suez, or at any time on the day of sailing from Suez, or at any time afterwards during the continuance of the risk in the said policy of insurance mentioned, seaworthy; but, on the contrary thereof, was at those times, and during all the time aforesaid, wholly unseaworthy.

Fourth plea.

The plaintiff demurred to the fourth plea, the ground of demurrer alleged, being, that “the policy in the first count is in the nature of a time policy, and that there is consequently no implied warranty of sea worthiness at the time of the commencement of the risk.” Joinder.

Demurrer.

Manisty, in support of the demurrer. (a) It is not necessary in this case to consider the question discussed in *Gibson v. Small*, 4 House of Lords Cases, 353, and *Jenkins v. Heycock*, 8 Moore’s P. C. Cases, 351, whether there is any implied warranty of sea-worthiness in the case of a time policy. Here, the policy was to attach on the meridian of the day of sailing from Suez. It does

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the policy of insurance in the first count of the declaration is a time policy, and is not subject to an implied condition or warranty that the ship was sea-worthy.

“2. That a policy from the day of sailing from a particular place, to a certain other day, is a *time policy*, and only sub-

ject to the same conditions and warranties as an ordinary time policy.

“3. That, in any case, the condition or warranty implied in a policy is only that a ship is seaworthy at the commencement of her voyage, and that it does not appear from the first count, or from the fourth plea, that the sailing from Suez was the commencement of any voyage.”

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not appear where the vessel was at the meridian of that day. She might have been then on her voyage from Calcutta. To sustain this plea, the defendant must shew that there is a warranty of sea-worthiness, and that at the time of the ship's sailing from Suez. If she was on her voyage from Calcutta to Suez at the time the policy attached, what becomes of that part of the plea which avers that she was not sea-worthy at the time of her sailing from the latter port? The next allegation in the plea is, that she was not sea-worthy at any time on the day of sailing. Upon the assumption above made, there is no ground for contending that she was warranted sea-worthy on that day. [*Cresswell*, J. In *Jenkins v. Heycock*, the vessel was sea-worthy after the policy attached. That distinguishes that case from the present; for, here, it is averred that the vessel was not sea-worthy at any time on the day of sailing from Suez.] That leaves the main point here untouched. We know not where the vessel was when the risk attached. [*Jervis*, C. J. I think the defendant should have leave to amend, so as to raise the point neatly, if he can.]

Tomlinson, contra. (a) The assured chooses his own adventure; and he elects to make the inception of the risk the sailing from Suez. The parties probably had in their view nautical time; and meant, that, at whatever period of the day the vessel should sail from Suez, the risk should commence with the first moment of that day. Therefore the defendant says in his plea, that the ship was not at the time of sailing from Suez, or at any time on the day of sailing from Suez, or at any time after-

(a) The point marked for argument on the part of the defendant, was,—“that, as the risk was to commence on the day of sailing from a given port

or place, there was an implied warranty or condition that the ship was seaworthy at that time.”

wards during the continuance of the risk, sea-worthy,—that is, she was not sea-worthy at the meridian of the day when the risk commenced, or at any time since during the continuance of the risk. A specific port is selected, with a view to evade the generality of a time policy. This is substantially a policy “at and from Suez,”—from a day and place of sailing, to a certain time after; a voyage policy so far as regards its commencement, and a time policy so far as regards its duration. [*Cresswell*, J. If it was meant to be a voyage policy, why was it not framed in the usual way?] As far as the authorities go, they merely *decide* this, that, in a time policy on a vessel then at sea, there is no implied warranty that the ship should be sea-worthy at the time the policy is intended to attach: *Gibson v. Small*, 4 House of Lords Cases, 353. It was further held in *Jenkins v. Heycock*, 8 Moore’s P. C. Cases, 351, that there is no warranty of sea-worthiness during an intermediate voyage,—at the commencement of each particular adventure. But there is great weight of judicial opinions, that, where a time policy is intimately associated with the commencement of the adventure, there is a warranty of sea-worthiness, in substance, from the commencement of the voyage insured. Not one of the questions propounded to the judges in *Gibson v. Small* precisely touches this question. But Lord Campbell says (at p. 422),—“If your Lordships shall be pleased, on the motion of my noble and learned friend (Lord St. Leonards), to affirm the judgment of the court of Exchequer Chamber in this case, it will be definitively established, that, by the law of England, in a time policy such as this, no special circumstances being stated in the declaration or the plea respecting the situation or the employment of the ship, there is not an implied condition that the ship should be sea-worthy on the day when the policy ought to attach. I think it right to

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say, that, after great deliberation, I agree with those judges who think that in a time policy there is no implied condition whatever as to sea-worthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was sea-worthy when it sailed on the voyage during which the policy attached. To lay down such a rule, would, I think, be a very arbitrary and capricious proceeding, and, being wholly unsanctioned by usage or by judicial authority, would be legislating, instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for, in fishing adventures, and where ships are employed for years in trading in distant regions from port to port,—the instances in which time policies are chiefly resorted to,—there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the terminus ad quem, in considering what the voyage truly is for which the ship must be fit. I have hesitated more upon the question whether, when a time policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of sea-worthiness is to be implied. This might be an exception to the general rule that in time policies there is no implied warranty of sea-worthiness, and it is free from some strong objections to the condition of sea-worthiness being implied where the risk is to commence abroad." Martin, B., says (p. 374): "If a time policy be effected upon a ship about to sail from a given port on a voyage or enterprise, the ship must in my opinion be sea-worthy at the time of sailing; otherwise, the policy does not render the underwriter liable." [*Cresswell, J.* Probably he assumes the attaching of the policy from the time of sailing "on a ship about to sail."] The learned Baron goes on,—“But,

in the event of a time policy being effected upon a ship after it has begun the voyage, and to commence during the progress of it, such a case is, I think, entirely out of the operation of the rules of law in respect of the 'warranty of sea-worthiness,' and is not affected by them; and, if the ship exists as a ship at the time of the commencement of the risk, the underwriter is responsible, whether it is then sea-worthy or not." Pollock, C. B., at p. 410, puts a similar case,—“If we put the case of an ordinary insurance for a voyage, enlarged into an insurance for time, beginning the adventure or risk with the sailing on a certain voyage from a given port, and continuing it for a given time, *I should think there would be in such case an implied condition that the ship was sea-worthy at the time of sailing on the voyage; and I should conclude that the commencement of the risk by the sailing on the voyage was introduced with the very object of thereby creating the implied condition.*” The judgment of Maule, J., is very much to the purpose. He says, p. 338,—“It appears to me that the foundation of the admitted rule, that, in a policy on a voyage, there is an implied condition or warranty that the ship was sea-worthy at the beginning of the voyage, is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy; and that it is usual, and a matter of course, to make a ship sea-worthy before the commencement of a voyage. It is clear that there is no such usage with respect to the sea-worthiness of a ship insured for time, without any mention of place or voyage at the commencement of the voyage, or at the time of effecting the policy; and, in the absence of the usage, the condition of warranty does not arise. It may be, perhaps, contended (*a*), that, in a

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(*a*) It could not be so contended since the case of *Jenkins v. Heycock*, 8 Moore's P. C. 351.

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time policy, the assured does not warrant that the ship is sea-worthy at the commencement of every voyage which may be undertaken during the time for which the insurance is effected. This question is not necessary to be determined, in order to affirm or reverse the judgment in this writ of error: and I am not aware that it has ever been judicially raised. I am, however, of opinion, though with some hesitation, that there is no such warranty in such a policy as this, whatever might be the case in a policy differently worded. I think this policy resembles, in this respect, a policy on a ship on a voyage, with leave to make intermediate voyages; in which case there is no warranty of sea-worthiness respecting the state of the ship at the commencement of the intermediate voyages, supposing it to have been sea-worthy at the beginning of the whole adventure." The substance of this plea, is, that the vessel was unseaworthy at the time of the commencement of the adventure. Alderson, B., at p. 392, says,—“If we are to try to apply the general principles of insurance law, as it is by some said that we ought, to such a case, and to make de novo an implied warranty of sea-worthiness in a time policy, I should adopt very nearly in terms, as the rule, the principle well expressed by Mr. Justice Lawrence, in the case of *Christie v. Secretan*, 8 T. R. 192, 198, adding to it, however, the qualification of Lord Mansfield, in the case of the *Mills* frigate. (b) ‘The warranty of sea-worthiness,’ says Mr. Justice Lawrence (speaking, however, of a voyage policy), ‘is implied from the nature of the contract. The consideration of an insurance is paid in order that the owner of a ship which is capable of performing the voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriter’s gaining the premium.’ Lord Mansfield’s suggestion of the

(a) *Mills v. Roebuck*, Park Ins. 8th edit. 460, Marsh Ins. 154.

impossibility of the owner's knowing the state of the ship after it has set out on the voyage, adds the reasonable modification, and shews that this possibility of the underwriter's gaining the premium must depend on the state of the ship, not at the time of the insurance effected, but at the commencement of the voyage, when the owner, by himself or his agent, could know it and provide for it." [*Cresswell*, J. Dare you say that this is a policy to commence with the voyage from Suez?] The decisions being somewhat various, it would be more convenient to retain the plea in its present form. [*Cresswell*, J. Then you seek to have the benefit of the plea, because you say that this is a policy to commence with the voyage, when you have not courage to aver it!] The policy attaches either on the commencement of the voyage from Suez, or from a time immediately preceding that adventure. When the case of *Small v. Gibson* was before the Exchequer Chamber,—16 Q. B. 128, 160,—Parke, B., in delivering the judgment of the court, observed: "We are far from saying that there is no warranty of sea-worthiness at all; so to hold would be, to let in the mischief which the law provides against by the implied warranty in a voyage policy: or that there is not the same warranty in the case of a time policy as in a voyage policy, *according* to the situation in which the ship may be at the commencement of the term of the insurance; that is, that the ship is or shall be sea-worthy for that voyage, if the ship then be about to sail on a voyage." That is precisely this case: and, if the Exchequer Chamber are right, there is in this case a warranty that the ship was sea-worthy for the voyage in question from the commencement of the nautical day of sailing. That dictum certainly is not judicially over-ruled either by the case of *Gibson v. Small* or by that of *Jenkins v. Heycock*, though undoubtedly it

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is at variance with the opinions expressed by some of the learned judges in the former case. All the reasons for implying sea-worthiness on a voyage policy, with equal force apply to the policy now before the court.

Manisty was heard in reply.

JERVIS, C. J. The facts are not averred in this plea so as to raise Mr. Tomlinson's point. Whatever the result of *Gibson v. Small*, this case clearly falls within the most limited construction of it. Therefore, unless the defendant will consent to amend, there must be judgment for the plaintiff.

CRESSWELL, J. We do not decide any thing in this case beyond what was decided in *Gibson v. Small*, which is expressly in point.

The rest of the court concurring,

Judgment for the plaintiff.

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WOOD v. THE GOVERNOR AND COMPANY OF COPPER
MINERS IN ENGLAND.

Jan. 28.

THIS was an action upon a special agreement.

The declaration stated, that, on the 21st of July, 1847, a deed was made and entered into by and between

1. By an agreement under seal,—reciting, amongst other things, that the plaintiff had

erected a factory, &c., for the purpose of carrying on the manufacture of patent-fuel, &c., and that the defendants had agreed to grant a lease of the land, &c., to the plaintiff, and to enter into certain other arrangements “for the supply of coal for the said manufactory,” and otherwise, on the terms therein mentioned,—it was agreed (amongst other things) that all the coals consumed by the plaintiff for the purpose of his manufacture during a certain term, should be purchased of the defendants, and that the defendants should not be compelled to supply more than 500 tons weekly.

In an action against the defendants for a breach of the implied contract to deliver 500 tons of coals weekly, the declaration averred that the plaintiff was at all times, &c., ready to receive that quantity, of which the defendants had notice, and required the defendants to deliver the same, and that “he had done all things on his part, and all things had happened, to entitle him to have the said 500 tons of coals in each week delivered to him,” &c. :—Held, that the declaration was sufficient, although it contained no specific averment that the supply was required by the plaintiff for the purpose of the manufacture of patent-fuel.

2. The defendants by their third plea alleged, that, before the accruing of the causes of action, and from thence hitherto, the plaintiff had wholly discontinued and abandoned the manufacture of the said fuel upon the terms of the said agreement :—Held, a good plea, upon the assumption that it meant a permanent abandonment of the works, and not, as the plaintiff in his replication averred, a mere temporary suspension thereof in consequence of the defendants’ failure to deliver the stipulated quantity of coal.

3. The defendants further pleaded,—for a defence on equitable grounds,—that, before the accruing of the causes of action in the declaration mentioned, and before the passing of The Governor and Company of Copper Miners Act, 1854 (14 & 15 Vict. c. cv), to wit, on the 24th of January, 1848, an action was brought by the plaintiff against the defendants for certain alleged breaches of the said contract, which action was depending at the time of passing that act; that the cause and all matters in difference were referred to an arbitrator, who by the order of nisi prius and a subsequent rule of court was empowered to make two several awards, raising by the first points of law for the opinion of the court, and to assess damages upon the view the court might take, and who was also empowered “to order the determination of the contract, and the terms on which such determination should take place,” neither of the parties to enforce payment of anything which might be found by the arbitrator to be due to him or them under the award so to be first made, until the arbitrator should have made and published his final award between the said parties. The plea then went on to allege, that the arbitrator made his first award, raising certain questions for the opinion of the court; that afterwards, and before the passing of the act, the court ordered judgment to be entered for the plaintiff; that no final award was ever made by the arbitrator, and the reference was still pending; that, at and after the statement of the case by the arbitrator, and before the passing of the act, the affairs of the defendants were in a state of insolvency, and that certain creditors of the defendants, with their concurrence, introduced into parliament a bill for settling their affairs, the passing of which bill was opposed by the plaintiff; that, whilst the bill was in committee, negotiations took place between the plaintiff and the promoters, which resulted in an agreement,—that the plaintiff should withdraw his opposition, that the contract

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 v. defendants, and the said deed was and is to the tenor
 THE COPPER and in the words and figures following, that is to say,—
 MINERS CO. “An agreement made and entered into the 21st of July,
 1847, between The Governor and Company of Copper
 Miners in England of the one part, and H. W. Wood,
 of &c., manufacturer of fuel, of the other part : Whereas
 the said H. W. Wood has lately erected a factory,
 works, and buildings on part of a certain piece of land
 belonging to the said governor and company, at Port
 Talbot, in the county of Glamorgan, South Wales, for
 the purpose of carrying on the manufacture of patent-

between the plaintiff and the defendants should be determined by the arbitrator, who should assess the sum to be paid by the defendants as the value of the said contract, that the plaintiff should bring no further actions against the defendants upon the said contract, and that a clause approved by the plaintiff should be introduced into the said bill whereby it should be enacted that the plaintiff should be deemed and considered a creditor of the defendants within the meaning of the act for such sum as should be assessed by the arbitrator, and that until the arbitrator should have made his final award the plaintiff should be deemed and considered a creditor of the defendants for 2272*l.* 2*s.*; that, in pursuance of the said agreement, and in order to give effect to the same, a clause approved of by the plaintiff was introduced into the said bill; that the defendants had always been ready and willing to give effect to the said agreement, and everything had been done entitling them to the performance and fulfilment of the same by the plaintiff; that the said bill was thrown out, and that, before the commencement of this suit, a bill to a similar effect was introduced (which was afterwards passed); and that thereupon an agreement was entered into between the plaintiff and defendants and the said other persons, with respect to the last-mentioned bill, and the said contract, and the determination thereof by the arbitrator, and the assessment of the sum to be paid to the plaintiff as the value of the said contract, and with respect to any actions being brought by the plaintiff upon the said contract, and with respect to the clause to be inserted in the said last-mentioned bill, to the like effect as the agreement thereinbefore mentioned; and that a clause (s. 12) was inserted in the said act accordingly. The plea then went on to aver, that the defendants had always acted in good faith and upon the terms of the last-mentioned agreement, and had always been and still were ready and willing to abide by the final award of the said arbitrator, and in all things to perform the agreement on their part, and that all things had been done and had happened entitling them to the performance and fulfilment of the same by the plaintiff, but that the plaintiff had refused to abide by the said agreement, and had brought this action in violation of the same; and that, after the passing of the said act, and before the commencement of this suit, the debts and claims in the said act in that behalf mentioned were duly converted into stock of the Copper Miners Company, in pursuance of the provisions of the said act, and that the plaintiff, as a creditor of the defendants for the said sum of 2272*l.* 2*s.* in the 12th section mentioned, applied for an allotment of stock in respect of the said sum, and had the same allotted to him by the defendants, and had had the full benefit, use, and advantage of such allotment,—wherefore the defendants said that in equity the plaintiff was barred from bringing this action:—

Held, that this was not a good equitable plea, inasmuch as it disclosed no ground upon which a court of equity would grant a perpetual unqualified injunction to restrain the plaintiff from suing upon the contract.

fuel: And whereas the said governor and company have advanced and paid to the said H. W. Wood, for and towards the erection and completion of the said factory, works, and buildings, and the machinery therein, divers sums of money amounting in the whole to 2500*l.*: And whereas the said governor and company have agreed to grant a lease of the said piece of land, and the manufactory and buildings and other the premises to the said H. W. Wood, and to enter into certain other arrangements for the supply of coal for the said manufactory and otherwise, on the terms and conditions hereinafter mentioned: Now these presents witness, and it is hereby agreed by and between the said parties in manner following, that is to say,—1. That the said governor and company shall grant a lease of the said piece or parcel of land, with the manufactory, buildings, and machinery thereon, to the said H. W. Wood, for the term of twelve years from the 25th of March last, at a pepper-corn rent, such lease and a counterpart thereof to be prepared at the expense of the said H. W. Wood,—2. That, immediately upon such lease being granted by the said governor and company, he the said H. W. Wood shall execute an assignment thereof, by way of mortgage, to the said governor and company, or their trustee, as a security for the re-payment of the said sum of 2500*l.*, with interest after the rate of 5*l.* per cent. per annum, within seven years from the date thereof, such mortgage to contain a power of sale, and all other usual powers,—3. That the patent-fuel manufactured by the said H. W. Wood, on which he may require an advance, shall from time to time be placed and laid down upon a certain piece of land which shall be adjoining to the said piece of land hereby agreed to be demised, but divided off for that purpose and for the purpose next hereinafter mentioned, and shall there be and remain in possession of the said governor and company as a security for any

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moneys at any time due and owing to the said governor and company by the said H. W. Wood on any account whatsoever, excepting the said sum of 2500*l.*, under or by virtue of this agreement: Provided, nevertheless, that such deposit of fuel, and such advance or advances, shall in no way prevent or prejudice the sale of fuel from time to time by the said H. W. Wood, who for that purpose shall have full liberty to ship or give delivery orders for the same; the said H. W. Wood in that event depositing or agreeing to deposit with the said company the cash or approved bills to be received by him as the price of or advance upon such fuel, when and as the same shall be sold,—4. That all the coals consumed and used by the said H. W. Wood for the purpose of his manufacture during the said term of twelve years, shall be bought and purchased of the said company, provided the said company can and shall supply him with the quantity that shall from time to time be required by him, or to such extent as the said company can supply; and that the said company shall charge for the same at and after the rate of 3*s.* 10*d.* per ton, delivered over the weigh-bridge on the premises of the said H. W. Wood at Port Talbot aforesaid, and no more; the said coal to be that which is clean and good for the purpose of manufacturing steam-fuel, and to be that which is known as small coal unscreened, unless passed through a screen of longitudinal bars not less than four inches apart; and that the said H. W. Wood shall use and consume no other coal at the said factory, during the said term, than that which is bought and purchased of the said company, excepting, nevertheless, in the event of the said H. W. Wood requiring more small coal than the said company can and shall supply him with, and excepting, nevertheless, for the purpose of making experiments in the manufacture of fuel,—in which case the said H. W. Wood is to be at liberty to

purchase and consume coal not being the company's coal,—such purchases and consumption of coal for the purposes of experiment, not to exceed 50 tons in quantity from any six collieries in any one year,—5. That the said company shall not be compelled to supply more than 500 tons per week ; and that, in case the said company shall from some substantial cause be unable to supply small coal to the extent agreed upon, the said company shall give to the said H. W. Wood six months' notice of such their inability, and in such case the said H. W. Wood shall be at liberty to obtain his supply of coal, or the excess beyond the quantity the said company can supply, from any other source, — 6. That all coal supplied to the said H. W. Wood by the said company shall be delivered over the weigh-bridge erected at Port Talbot aforesaid, at the said patent-fuel works, at the rate of 3s. 10d. per ton, including the use of trams, waggons, haulage and other necessary incidental expense to the weighing-machine, and the use of trams from the weighing-machine to the manufactory,—such further haulage to be at the expense of the said H. W. Wood ; and the said H. W. Wood shall, if he shall so think fit, be at liberty to pass the said coal over a screen of longitudinal bars not less than half an inch apart ; and all coal which will not pass through such screen shall be deemed rubble coal, and shall be taken back by the said governor and company within fourteen days after notice in writing shall have been given as next hereinafter is mentioned, and paid for by them in cash, at the rate of 1s. 6d. per ton, at the periods hereinafter specified for the rendering accounts of all coal delivered,—7. That the said company shall supply to the said H. W. Wood, in lieu and in place of the rubble coal so returned, free of cost and expense to him, an equal quantity of the coal hereby agreed to be delivered, within fourteen days after notice in writing shall have been given specifying

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as nearly as is practicable the quantity so to be removed; and, in case the said company shall neglect to remove the said rubble coal, and to replace the same with such coal as aforesaid within the time aforesaid, they shall pay to the said H. W. Wood the sum of 2*l.* per diem, to be recovered as liquidated damages,—8. That, if the said coal shall not be of such quality of small coal as is required by the said H. W. Wood, and fit for the purposes of the manufacture, the same shall be notified to the said company within fourteen days after the same shall have been delivered, otherwise the same shall be deemed and taken to be good and sufficient for the purposes, and shall be charged for accordingly; but, in case the said H. W. Wood shall give notice to the company, within the said period of fourteen days, that the said coal is not good and fit for the purposes of the manufactory, then the said company shall either take back the same, or shall, within seven days after such notice shall have been delivered, refer the question to the decision of an individual to be agreed upon between them and the said H. W. Wood; and, in case they cannot agree, shall give the name of a referee, who, together with a referee to be named by the said H. W. Wood, or such third party as such two referees shall appoint, shall award and determine whether such small coal be good and sufficient for the purpose of the said manufacture, and as agreed for; and, in either of the said cases, the said company and the said H. W. Wood shall be mutually bound by such decision,—9. That the said H. W. Wood shall be at liberty to erect a shipping-stage adjoining the said fuel manufactory on the river Avon, and the said company shall contribute towards the cost and expense of erecting the same, when and after the same shall have been erected, a sum not exceeding 50*l.*, and shall also allow the said H. W. Wood, for the purpose of shipping patent-fuel, or receiving pitch, to make use of some one

of their shipping-stages and weighing-machines, in regular turn according to the stemming-list, due diligence being at all times used, on the float at Port Talbot aforesaid, free of charge,—10. That the account for all coals delivered by the said company to the said H.W.Wood, after the rate of 3*s.* 10*d.* per ton, shall be rendered to the said H.W.Wood every three months, and shall include all coals delivered during that period; and, if no objection be stated to such account within ten days after the same shall have been delivered, the same shall be taken (errors excepted) as a correct account, and the said H.W.Wood shall be debited on the tenth day of the succeeding month with the amount found to be due to the said company upon such account, and the said H.W.Wood shall thereupon accept the drafts or bills of the said company for the amount so appearing due,—such bills or drafts, including interest at 5*l.* per cent., to be drawn at not less than twelve months' date,—11. That the said H.W.Wood shall not take down or remove the said manufactory and premises so erected and built as aforesaid, or the machinery in and about the same; but that such buildings, erections, and machinery shall be and remain as a security to the said company for all moneys that shall at any time be due or owing to them, either on account of advances incident to the erection of such buildings and machinery, or for advances made upon manufactured fuel, if any, or for moneys that shall be due in respect of coals supplied, or any other account whatever under and by virtue of this agreement: Provided always, nevertheless, that, upon the said H.W.Wood paying or securing any balance that may, at any time during the continuance, or at the determination, of this agreement, be due from the said H.W.Wood to the said company, the said company shall, if required so to do by the said H.W.Wood, take, at a valuation to be made by a referee or referees so to be chosen as afore-

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said, the machinery and fixtures of and upon the said manufactory and premises,—12. That, in the lease to be granted to the said H. W. Wood, a covenant for title shall be inserted on the part of the company, and covenants shall be inserted on the part of the said H. W. Wood, that the premises so to be leased shall not be used for any other purpose or purposes than for the manufacture of patent-fuel, and that the said H. W. Wood shall not underlet or assign the said premises, or any part thereof, without the consent of the said company, such consent not being unreasonably withheld,—13. That, in case the said H. W. Wood shall cease to use and consume the small coal of the said company, by reason of their inability to supply him therewith, as hereinbefore mentioned and agreed, or otherwise howsoever, and the said H. W. Wood shall continue in the occupation of the said premises, the said H. W. Wood shall pay to the said company a rent or sum of 100*l.* per annum during the then continuance of this agreement, such rent to commence within six months after the said H. W. Wood shall so cease to use and consume the small coal of the said company as aforesaid,—14. That the said agreement, to be determinable as aforesaid, shall continue for the term of twelve years from the date hereof; and that, at the expiration of such term of twelve years from the date hereof, if the said H. W. Wood shall so elect and determine, and of such election or determination shall give one month's notice in writing to the said company, but not otherwise, the said company shall pay or allow to the said H. W. Wood the then value of the machinery and fixtures, such value to be ascertained by arbitration, in the manner hereinafter mentioned: Provided also, and it is also agreed and declared between and by the said parties hereto, that, if, at any time during the continuance of this agreement, any disputes or differences shall arise between the said

parties respecting any clause, matter, or thing herein contained, or relating to the premises, or otherwise arising out of this agreement, the same shall be referred to the arbitration of two indifferent persons, one to be chosen by each party, and the decision or award in writing of such arbitrators, in case they shall agree upon the matters in dispute, or of their umpire, which they are hereby authorised to appoint, in case they shall differ, shall be binding and conclusive on the said parties hereto, provided such award, whether by the arbitrators or their umpire, shall be in writing, and be delivered to the parties within one calendar month after the matters therein contained shall have become the subject of reference to arbitration: Provided that the said piece or parcel of land, manufactory, and premises, shall not be a security for a larger amount than 5000*l.*:" Averment, that, although, at all times after the making of the said agreement, the plaintiff was ready and willing to receive from the defendants 500 tons of the said small coals per week,—of which the defendants had always notice; and although, before and during all the period in which the defendants made default as thereafter mentioned, he required the defendants to deliver to him in each week the said quantity of 500 tons; and the plaintiff had done all things on his part, and all things had happened, to entitle him to have the said 500 tons of small coals in each week delivered to him; yet the defendants did not nor would, in any of the weeks commencing with the week which expired next after the 1st of December, 1853, until the commencement of the suit, supply the plaintiff with 500 tons, or any quantity, of the said small coal, according to their covenant in that behalf, but therein made default; whereby and by reason of the plaintiff not being able to procure the said quantities of small coal elsewhere, he the plaintiff during the time aforesaid was wholly prevented from carrying on the said manufacture

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Demurrer to the declaration.	The defendants demurred to the declaration,—the ground of demurrer stated in the margin, being, “that the deed set out in the declaration contains no covenant by the defendants to supply coal.” Joinder.
First plea.	First plea,—that the plaintiff did not, during the said period in the declaration mentioned, require the defendants to deliver to him in each week the said coal, nor was he ready and willing to accept the said coal, or pay for the same, according to the said agreement. Issue thereon.
Second plea.	Second plea,—that the said coal which was so required by the plaintiff, was not required by him for the purpose of manufacturing fuel with the same, according to the said agreement. Issue thereon.
Third plea.	Third plea,—that, after the making the said agreement, and before the 1st of December, 1853, and from thence hitherto, the plaintiff had wholly discontinued and abandoned the manufacture of the said fuel upon the terms of the said agreement.
Fourth plea.	Fourth plea,—for a defence on equitable grounds to the said declaration, the defendants said, that, before the accruing of the causes of action in the declaration mentioned, and before the passing of The Governor and Company of Copper-Miners Act, 1851, that is to say, on the 24th of January, 1848, an action of covenant, being the action of covenant in the 12th section of the said act mentioned, was brought in Her Majesty’s court of Common Pleas by the plaintiff against the defendants, for certain alleged breaches by the defendants of the said contract between the plaintiff and the defendants, and which said action was depending at the time of passing the said act: That the said action and all matters

in difference between the plaintiff and the defendants were referred to T. Bros, Esq., in the said act mentioned, by an order of nisi prius, of which said order the following is a copy [setting out the order, by which a verdict was to be entered for the plaintiff for the damages in the declaration, and costs 40s., subject to the award or certificate, order, arbitrament, final end, and determination of Mr. Bros, to whom the cause and all matters in difference between the said parties were thereby referred, "to raise in his award such questions of law for the opinion of the court as either of the parties might call upon him to do, and who was to assess the damages contingently upon the demurrer, and upon the views which the court might eventually take of the questions at law, with power to order the determination of the contract, and the terms upon which such determination should take place: the demurrer to be argued at the same time, or taken as part of the award, so as to be heard along with the other questions of law: and the said arbitrator was to order and determine what he should think fit to be done by the said parties respecting the matters in dispute;" so as the said arbitrator should make and publish his award on or before the fourth day of Easter Term, with liberty to enlarge: the costs of the cause to abide the event of the award or certificate, and the costs of the reference and award, in case an award should be made, to be in the discretion of the arbitrator, who was to award by whom, to whom, and in what manner the same should be paid; and the costs of the reference and certificate, in case a certificate should be made, to be costs in the cause:] That, on the 15th of April, 1848, the time for making the award was duly enlarged until the fourth day of Michaelmas Term then next: That, on the 11th of May, in the same year, the said order was made a rule of court, and on the same day a rule of the said court, in the matter

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of the said arbitration was made, as follows :—“ In the Common Pleas, &c. Upon reading a rule made in this cause this day, and on hearing and by consent of counsel on both sides, it is ordered, that the arbitrator in the said rule named, to whom this cause and all matters in difference between the said parties stand referred, shall be at liberty, notwithstanding the said rule, to make and publish two several awards, at different times, of and concerning the several matters referred to him by the said rule, instead of one award only, as directed thereby; and that the said arbitrator shall be at liberty also in and by the first of his said awards so to be made as aforesaid, to raise such points of law for the opinion of this court as either of the said parties shall require him to do, and also to assess the damages contingently upon the demurrer depending in this cause, and upon the view which this court may take of the questions of law so to be submitted to them as aforesaid: And by the like consent it is further ordered, that, after the judgment of this court shall have been given upon the said demurrer, and also upon the questions of law so to be submitted to this court as aforesaid, the said arbitrator shall be at liberty to make and publish his second award of and concerning the other matters so as aforesaid referred to him by the said rule, and shall have power to order the determination of the contract, and the terms on which such determination shall take place, and also to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute between them, having regard to the said judgment of this court upon the said demurrer, and upon the questions of law so to be submitted as aforesaid: And, by the like consent, it is further ordered, that, in all respects, the said rule and submission to reference as therein mentioned shall be and remain in full force, and the said arbitrator shall have and exercise all the powers and

authorities given to him by the said submission and rule until after the making and publishing of his said second award as aforesaid: And, by the like consent, it is lastly ordered, that neither of the said parties shall enforce payment of anything which may be found by the said arbitrator to be due or owing to him or them under the award so to be first made as aforesaid, until the said arbitrator shall have made and published his final order between the said parties:” That, after the making the said last-mentioned rule, and before the passing of the said act, the said arbitrator, by a certain paper writing, after reciting the said rules and the said enlargement of time, and that he the said arbitrator had been attended by the counsel and attorneys for the parties, and had examined the witnesses, and weighed and considered the evidence, as well on the part of the plaintiff as of the defendants, and that he had been requested by the plaintiff and the defendants to raise a certain question of law in the shape of a case for the opinion of the said court, did thereby state for the information of the said court, and in order that they might be able to pronounce on the said question of law, a certain special case, in which, after setting forth the facts, the said arbitrator did state for the opinion of the court, and order the verdict to be entered as follows, that is to say,—“The questions for the opinion of the court are,—first, whether the first breach is sufficient in law: if the court shall be of opinion that it is, then I assess the damages sustained by the plaintiff by reason of such breach at 2272*l.* 2*s.*; if not, then judgment is to be entered for the defendants on that breach,—secondly, whether the defendants, by the delivery to the plaintiff of the small coal in the manner stated in the case, did supply to the plaintiff, in lieu and in place of the rubble-coal returned, an equal quantity of the coal agreed to be delivered by the deed: if the court shall be of opinion that the defendants did,

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under the circumstances stated in the case, supply to the plaintiff, in lieu and in the place of the rubble-coal returned, an equal quantity of the coal agreed to be delivered by the deed, then a verdict is to be entered for the defendants on the issue joined on the fifth plea; otherwise, the verdict for the plaintiff on that plea to stand,—thirdly, if the court shall be of opinion that the plaintiff is entitled to a verdict on the issue joined on the fifth plea, then the opinion of the court is requested whether the second breach is sufficient in law; and, if the court shall be of opinion that the second breach is not sufficient in law, then judgment for the plaintiff on such breach is to be arrested,—fourthly, if the court shall be of opinion that the second breach is sufficient in law, then the opinion of the court is requested whether the plaintiff is entitled to more than nominal damages in respect of the second breach; and, if the court shall be of opinion that the plaintiff is entitled to more than nominal damages in respect of the second breach, whether such damages are properly calculated in the mode contended for by the plaintiff; if not, whether they are properly calculated in any, and, if so, in which, of the modes contended for by the defendants: if not, the court will be pleased to direct in what way the damages are to be calculated, and a verdict to be entered for the plaintiff for the amount, when ascertained: And I direct that the verdict entered for the plaintiff on the first, second, third, and fourth issues joined between the parties shall stand, and that the verdict on the fifth issue joined between the parties be entered for the plaintiff or the defendants, as the court may, on consideration of this case, direct; and, if for the plaintiff, then with such damages as the court may direct, and that judgment shall be finally entered for such party, and in such form, as the court upon consideration of the premises shall deem meet: or, if the court shall think right that judg-

ment for the plaintiff be arrested, then that judgment for the plaintiff be arrested accordingly: And I direct that the pleadings in this case and the deed of the 21st of July, 1847, shall be considered as part of this case:” That, afterwards, and before the passing of the said act, the said court of Common Pleas ordered judgment to be entered for the plaintiff on the demurrer to the first count of the declaration in the said action, and pronounced their opinion on the said point of law, except as to the fifth issue, upon which it was agreed that no decision should be given by the court or the arbitrator, and that the same should be treated as if the jury had been discharged as to that issue: That, at the time of the passing the said act, and from thence hitherto, no final or other award upon the matters so referred to the said T. Bros had been made by him the said T. Bros, and the said reference to the said T. Bros is still pending and undetermined: That, at and after the statement of the said case by the said T. Bros, and before the passing of the said act, that is to say, in the month of June, 1850, the affairs of the defendants were in a state of insolvency; and that certain persons, being creditors of the defendants, with the concurrence of the defendants, introduced into parliament a bill for an act for facilitating a settlement of the affairs of the defendants; the passing of which said bill was opposed by the plaintiff, who appeared by counsel before a committee of the House of Commons for the purpose of opposing the said bill: That, while the said act was under the consideration of the said committee, the same being a committee duly appointed in that behalf, and, during the said opposition of the plaintiff, certain negotiations took place between the plaintiff and the said promoters of the said bill, with respect to the said opposition of the plaintiff to the passing of the said bill, and that the result of the said negotiations was, an agreement between

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the plaintiff and the said persons and the defendants, that the plaintiff should withdraw his opposition to the said bill; that the said contract between the plaintiff and the defendants should be determined by the said T. Bros, under the power given to him in that behalf by the said rules,—the said T. Bros assessing the sum to be paid by the defendants to the plaintiff as the value of the said contract; *that the plaintiff should bring no further actions against the defendants upon the said contract*; and that a clause, approved of by the plaintiff, should be introduced into the said bill, whereby it should be enacted that the plaintiff should be deemed and considered a creditor of the defendants within the meaning of the said act for all and every such sum or sums of money as should be assessed to the plaintiff under and by virtue of the said rules by the said T. Bros, or by any other arbitrator to whom the said cause and matters might at any time hereafter be referred in the place of the said T. Bros, and for any costs which might be awarded by the said T. Bros, or other such arbitrator, to be paid by the defendants to the plaintiff; and that, until the said T. Bros, or other such arbitrator, should have made his final award, the plaintiff should be deemed and considered a creditor of the defendants for the said sum of 2272*l.* 2*s.* : That, in pursuance of the said agreement, and in order to give effect to the same, a clause approved of by the plaintiff was introduced into the said bill,—the same being to the same effect as s. 12 of the said “Governor and Company of Copper Miners Act, 1851:” That the defendants had always been ready and willing to give effect to the said agreement, and every thing had been done entitling them to the performance of and fulfilment of the same by the plaintiff: That the said bill so introduced as aforesaid was thrown out and rejected by the said committee; and that, before the commencement of this suit, to wit,

in May, 1851, a bill to a similar effect had been and was introduced into parliament by the defendants and others, and which afterwards, with various alterations therein, became and was "The Governor and Company of Copper Miners Act, 1851." That thereupon an agreement was entered into between the plaintiff and the defendants and the said other persons with respect to the said last-mentioned bill, and the said contract, and the determination thereof by the said T. Bros, and the assessment of the sum to be paid to the plaintiff as the value of the said contract, and with respect to the clause to be inserted in the said last-mentioned bill, to the like effect as the agreement therein-before mentioned: That the 12th section of the said "Governor and Company of Copper Miners Act, 1851," was introduced into the said last-mentioned bill, and remained and was passed in the said act, in consequence and in pursuance of the said last-mentioned agreement and such approbation of the plaintiff, and with the full consent and concurrence of the plaintiff and the defendants: That the defendants had always acted in good faith, and upon the terms of the said last-mentioned agreement, and had always been and still were ready and willing to abide by the final award of the said T. Bros, and in all things to perform the said agreement on their part; and all things had been done and had happened entitling them to the performance and fulfilment of the same by the plaintiff; but that the plaintiff had refused to abide by the said agreement, and had brought this action in violation of the same: That, but for the passing of the said act, the defendants would have continued and still been hopelessly insolvent, nor could or would the plaintiff have recovered any part of any claim of him the plaintiff upon the defendants: That, before the commencement of this suit, the lands, mines, collieries, hereditaments, ore, plant, machinery,

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fixtures, and effects of the company mentioned in the said act and comprised in the mortgage security in the said act recited, were, under the provisions of the said act, duly re-conveyed to the defendants by the governor and company of the Bank of England: That, after the passing of the said act, and before the commencement of this suit, the debts and claims in the said act in that behalf mentioned, were duly converted into stock of the defendants, in pursuance of the provisions of the said act: And that the plaintiff, as a creditor of the defendants for the said sum of 2272*l.* 2*s.*, in the 12th section mentioned, applied for an allotment of stock in respect of the said sum, and had the same allotted to him by the defendants, and had had the full benefit, use, and advantage of such allotment,—wherefore the defendants said, that, in equity, the plaintiff was barred from bringing this action.

Second replication to the third plea.

Second replication to the third plea,—that the said discontinuing and abandoning by the plaintiff of the said manufacture of the said fuel, was caused by the defendants' breach of the said agreement, to wit, in the non-delivery to him of coal, in accordance with the said agreement, and not otherwise.

Demurrer to the third plea.

Demurrer to the third plea, on the ground that "the discontinuing and abandoning the manufacture of patent-fuel was not a rescinding of the agreement, nor an exoneration of the defendants from performing it. Joinder.

Second replication to the fourth plea.

Second replication to the fourth plea,—that, after the stating by the said T. Bros of the said case for the opinion of the said court, and after the pronouncing of the decision of the said court thereon, and after the passing of the Governor and Company of Copper Miners Act, 1851, the said reference to the said T. Bros was by the mutual consent and agreement of the plaintiff and

T. Bros, as such arbitrator, was discharged from making any final or other award upon the several matters so referred; and the said reference, before and at the commencement of this action, was, and now is, at an end and determined.

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And for a further replication to the fourth plea, on equitable grounds,—that the said T. Bros, as such arbitrator as in that plea mentioned, made his first award, being the said paper writing in the last plea mentioned, but did not thereby, or at any time, order or award the determination of the said contract, and the terms on which such determination should take place; that the said T. Bros exercised the option by the said order of nisi prius reserved to him as to ordering and awarding the determination of the contract, and decided not to order and award such determination of the said contract, except with the consent of both the plaintiff and the defendants, and gave notice to the plaintiff and the defendants respectively of such his decision, which was assented to by them respectively; that, afterwards, and before any order or award was made by the said T. Bros as to such determination of the contract, and long before the commencement of this action, the plaintiff gave notice to the said T. Bros, that he, the plaintiff, refused his consent to the said T. Bros ordering and awarding such determination; that the plaintiff did not at any time, nor does he now, waive or withdraw such notice, or consent to any such order or award being made; and that, by reason and in consequence thereof, the said T. Bros had always refused and still did refuse to order and award the determination of the contract; and that the said reference as to the said determination of the said contract, by reason of the premises, had become and was wholly inoperative and of none effect.

Third replica-
tion (on equit-
able grounds)
to the fourth
plea.

And for a further replication to the fourth plea, on equitable grounds,—that the said T. Bros, as such

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able grounds)
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arbitrator as in that plea mentioned, made his first award, being the said paper writing in the last plea mentioned, but did not thereby, or by any other award, order or award the determination of the said contract; that, long after making the said rule in the said last plea mentioned, and after the passing of the Governor and Company of Copper Miners Act, 1851, the plaintiff brought a second action in Her Majesty's court of Common Pleas, to recover damages for certain other breaches of the said contract between the plaintiff and the defendants by them the defendants committed after the reference of the said first action to the said T. Bros, and the defendants pleaded to the declaration in the said second action several pleas: That the determination of the said contract, if ordered by the said T. Bros, would have put an end to the said contract as and from a time before the committing of certain of the breaches of covenant by the plaintiff in his said second action complained of; but that the defendants did not then, or at any other time, either by any plea in the said action, or by bill, suit, or other proceeding in equity, seek or endeavour to stay, injoin, or otherwise interfere with the progress of the said action, or set up any of the matters by them in the said last plea now pleaded, by way of defence to, or in order to obtain a stay of, the said second action: That the said second action, and all matters in difference therein, were by an order of nisi prius, made with the consent of the plaintiff and the defendants respectively, referred to W. Rose, Esq., barrister-at-law; and that the plaintiff and the defendants respectively appeared before the said W. Rose as such arbitrator, and were heard by their counsel upon the matters so referred; and that the said W. Rose made his award upon the said matters so referred, and ordered judgment to be entered up therein for the plaintiff, for 7600*l.*; and that such judgment was so entered up

accordingly, and was still unsatisfied: And that the facts above mentioned were in equity a determination of the said reference, and in equity precluded the defendants from setting up, in defence to this action, that the said reference to the said T. Bros is still pending.

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The plaintiff also demurred to the fourth plea, on the ground that "the facts stated shew that the plaintiff cannot compel the arbitrator to award him compensation, and that his right of action could not therefore in any case be absolutely barred."

Demurrer to
the fourth plea.

Demurrer to the second replication to the third plea, on the ground that "the replication raised an immaterial issue, and neither traversed nor confessed and avoided the plea." Joinder.

Demurrer to
the second re-
plication to the
third plea.

Demurrer to the first replication to the fourth plea on equitable grounds,—on the ground that, "in equity, the replication is no answer to the plea." Joinder.

Demurrer to
equitable repli-
cation to the
fourth plea.

The defendants also joined issue on the second replication on equitable grounds to the fourth plea.

The demurrers now came on for argument.

Bovill (with whom was *R. E. Turner*), for the defendants. (a) 1. The agreement, upon which two

1. Declaration.

(a) The points delivered for argument on the part of the defendants, were as follows:—

"As to the declaration,—
1. That the agreement set out therein contains no covenant by the defendants to supply coal,*—2. That there is no averment in the declaration,

that the defendants were able to supply the coal during the period of the breach,—3. That there is no averment in the declaration that the plaintiff required the coal for the purpose of the manufacture of fuel."**

"As to the third plea,—That

* This point having already been decided in this court, antè, Vol. XIV, p. 428, it was assumed that such a covenant was impliedly contained in the agreement.

** Such an averment was contained in the declaration in the first action,—antè, Vol. VII, p. 906.

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other actions have already been brought,—see 7 C. B. 906, 14 C. B. 428, (a) — is set out in the declaration verbatim, as on the first occasion. In substance, the Copper-Miners Company thereby contract to grant the plaintiff a lease of a factory and premises for twelve years at a pepper-corn rent, and during the like period

the plea is an answer to the action: see *Wood v. The Copper-Miners Company*, ante, Vol. XIV, p. 428."

"*As to the second replication to the third plea*,—That the replication is bad in substance; that the abandonment of the manufacture of fuel by the plaintiff, determined the defendants' liability to supply coal, from whatever cause that abandonment proceeded; and that, if any misconduct or default of the defendants caused the abandonment, the action should have been brought in respect of such misconduct or default."

"*As to the equitable (fourth) plea*,—That the facts stated in it furnish a complete answer in equity to the action; that, upon such facts, a court of equity would decree a perpetual injunction against any further proceedings on the contract; and that the plea shews a determination in equity of the contract, and a substitution of an agreement, for consideration, which has been acted upon by both parties, and under which the plaintiff has accepted a benefit, by the insertion of s. 12 in the company's act (14 & 15 Vict. c. cv), the receipt of stock, and otherwise."

"*As to the second replication to the equitable plea*,—That the same discloses no answer to the plea; and that, the contract having been determined in equity by the facts stated in the last plea, and the substituted agreement having been acted upon by both parties, the abandonment of the reference, as alleged in the replication, would not revive the original contract, or the rights of the parties under it."

"*As to the first equitable replication*,—That the same is no answer to the plea; that, under the agreement stated in the equitable plea, neither the plaintiff nor the defendants were entitled to refuse their consent to the determination of the contract by Mr. Bros; that the plaintiff's refusal was a breach of the agreement, which he cannot set up in answer to the plea; that the court, or the parties, can substitute another arbitrator for Mr. Bros, if he refuses to proceed; and that Mr. Bros, or another arbitrator, can proceed under the reference without the plaintiff's consent."

(a) See note (a) at the end of this case,—p. 594.

(subject to a stipulation for its discontinuance) agree to supply the plaintiff with such coal as he might require for the purpose of the manufacture of patent-fuel at the works demised to him. On the argument on the demurrer on the last occasion, this court held, that, under the agreement, the plaintiff was entitled to all such coal, not exceeding 500 tons per week, as was required by him for the purpose of his manufacture: and, for the purpose of this argument, it must of course, be assumed that the court will abide by that decision. There is, however, no allegation in this declaration, as there was there, that the supply was required by the plaintiff for the purpose of the manufacture of patent-fuel. For any thing that appears, he may have wanted it for sale in the market. [*Jervis*, C. J. There is the general averment that "the plaintiff had done all things on his part and all things had happened, to entitle him to have the said 500 tons of small coals in each week delivered to him." What more could be necessary?]

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2. The third plea, which alleges, that, before the accruing of the causes of action, and from thence hitherto, the plaintiff has wholly discontinued and abandoned the manufacture of the said fuel upon the terms of the said agreement, is a complete answer to the action. [*Crowder*, J. What do you understand by discontinuing and abandoning the manufacture?] Discontinuing, without any intention to resume it. [*Jervis*, C. J. The plaintiff replies to the plea, that the said discontinuing and abandoning by him of the manufacture of the fuel was caused by the company's breach of their agreement, in the non-delivery of the coal, in accordance with the agreement. He also demurs to the plea; and the defendants demur to the replication. According to the old rule of pleading, the words "discontinue and abandon" would be taken most strongly against the defendants on the demurrer to the plea;

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and, on the demurrer to the replication, they would have to be taken most strongly the other way. Since, however, the abolition of special demurrers, that rule cannot apply. The words must in each case receive a reasonable construction. (a)] [After some discussion, it was agreed that the plea should be held good, upon the assumption that it meant a permanent abandonment of the works.]

3. Fourth plea.

3. The fourth plea sets up, by way of defence on equitable grounds, an agreement, upon good consideration, that no further action should be brought upon the contract. The company being hopelessly insolvent, as appears from the recitals of the act of 14 & 15 Vict. c. cv, and totally disabled from continuing their works, apply to parliament to relieve them from their difficulties, and to place their affairs upon a more satisfactory basis. The plaintiff appearing before the committee to oppose the passing of this bill, an agreement is entered into between him and the company, that he should withdraw his opposition, that the contract between him and the company should be determined by the arbitrator, he assessing to the plaintiff the value thereof, that no further action should be brought upon the contract, and that the terms of that agreement should be embodied in a clause to be inserted in the bill. Accordingly, a clause (s. 12) was inserted in the bill (which afterwards passed), whereby, after reciting that "a certain action of covenant was depending in Her Majesty's court of Common Pleas, wherein H. W. Wood was plaintiff and the Governor and Company of Copper-Miners in England were defendants, and the said action, and also all matters in difference between the said H. W. Wood and the said Governor and Company of Copper-Miners in England stood referred to T. B., Esq., with power to publish two separate awards at different times, and by the first of such

(a) See *Goldham v. Edwards*, *antè*, p. 141.

awards to raise points for the opinion of the court, and on the judgment of the court thereon to make his second award; and that, on the 6th of November, 1848, the said T. B. made his first award, and thereby assessed certain damages sustained by the said H. W. Wood at the sum of 2272*l.* 2*s.*, and the verdict was issued* for the plaintiff on the first four issues, and certain questions of law were raised for the opinion of the court on the fifth issue, and the second and final award of the said arbitrator had not been made,"—it was enacted "that the said H. W. Wood should be deemed and considered a creditor of the said Governor and Company of Copper-Miners in England, within the intent and meaning of this act, for all and every such sum and sums of money as have been and shall be awarded to the said H. W. Wood by the said T. B., or by any other arbitrator to whom the said cause and matters may hereafter at any time be referred in the place of the said T. B., and for any costs which shall be awarded by the said T. B., or other such arbitrator as aforesaid, to be paid by the said Governor and Company of Copper-Miners in England to the said H. W. Wood; and that, until the said T. B., or such other arbitrator as aforesaid, shall have made his final award, the said H. W. Wood shall be deemed and considered a creditor of the said company for the said sum of 2272*l.* 2*s.*" The plea alleges, that, in pursuance of the arrangement thus made, the plaintiff has obtained an allotment of shares in respect of that sum of 2272*l.* 2*s.* No authority need be cited to shew that this was a perfectly good agreement, and made upon sufficient consideration; and, having been partly performed, equity would enforce it. In Smith's Manual of Equity Jurisprudence, p. 155, it is said: "A parol agreement will also be enforced, whether it is an original agreement or a variation of or substitute for a prior written agreement, where it has been partly carried into execution, and it

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is shewn by satisfactory evidence to be clear, definite, and unequivocal in all its terms. As to the acts which will be deemed a part performance, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement; and they must have put the party who has performed them in such a situation that it would be a fraud in the other party, after allowing him to do them, not fully to perform the agreement: for, the ground on which courts of equity enforce specific performance in such cases, is, that, if the party allowing these acts to be done were not obliged to fulfil the agreement, it would be permitting him to commit a fraud." And this is the substance of the doctrine laid down in Story's Equity Jurisprudence, §§ 759, 761, 762, 764, 770. In the section last referred to, Dr. Story says: "Courts of equity will let in the defendant to defend himself by evidence to resist a decree, where the plaintiff would not always be permitted to establish his case by the like evidence. Thus, for instance, courts of equity will allow the defendant to shew, that, by fraud, accident, or mistake, the thing brought is different from what he intended, or that material terms have been omitted in the written agreement, or *that there has been a variation of it by parol, or that there has been a parol discharge of a written contract.* The ground of this doctrine is that which has been already alluded to, that courts of equity ought not to be active in enforcing claims which are not, under the actual circumstances, just as between the parties." [Williams, J. What is the principle on which part-performance is held to be a ground for enforcing a contract in equity?] Sir E. Sugden, Vendors and Purchasers, 11th edit. p. 169, says: "Where the parol variation has been in part performed, equity, acting upon its general principles, will decree a specific performance of the agreement as varied by parol."

And, after referring to *Anonymous*, 5 Vin. Abr. 522, pl. 38, *Legal v. Miller*, 2 Ves. sen. 299, *Gorman v. Salisbury*, 1 Vern. 240, *Pitcairne v. Ogbourne*, 2 Ves. sen. 375, and *Price v. Dyer*, 17 Ves. 356, he says: "The result of the authorities as to a parol variation, appears to be,—first, that evidence of it is totally inadmissible at law,—secondly, that, in equity, the most unequivocal proof of it will be expected,—thirdly, that, if it be proved to the satisfaction of the court, yet it cannot be used as a defence to a bill demanding a specific performance of the original contract alone, or as a ground for granting a specific performance of the original contract with the variation introduced by parol, *unless* there has been such a part-performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement (a), and effect will be given to it, either in favour of a plaintiff or a defendant." And at p. 173, he says,—"It has been the prevailing opinion that a written contract may, in equity, be discharged by a parol agreement. And in the case of *Price v. Dyer*, before referred to, Sir W. Grant (M. R.) said that he inclined to think the effect of a clear abandonment by parol would be, to discharge the written agreement." There being here a good parol agreement to discharge the written contract declared upon, and that agreement having been in part performed, and the plaintiff having had the benefit of such part-performance, the plea in question affords a good equitable defence to the action.

3. The second replication to the fourth plea is a *legal* replication to an *equitable* plea, which could hardly have been within the contemplation of the legislature. [*Cresswell*, J. It has been held that there cannot be an

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3. Second replication to the fourth plea.

(a) See *Van v. Corpe*, 3 Mylne & K. 277.

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equitable rejoinder to an equitable replication. Can there be none at all?] The substance of the agreement as set out in the fourth plea, is, that no further action should be brought upon the contract, and that the contract should be determined and put an end to by the arbitrator. The replication is, that, after the statement of the case, and the decision of the court thereon, and after the passing of the act, the reference was by mutual consent put an end to, and the arbitrator discharged from making his final award. What does that amount to? Both parties agree that the reference shall be at an end. The replication does not affect to allege a rescinding of the agreement relied on in the fourth plea; nor does it allege that the plaintiff gave back the shares which he received under it. It is therefore clearly no answer to the plea.

4. Equitable replication.

4. The equitable replication to the fourth plea states, in substance, that the reference has become inoperative by reason of the refusal of the arbitrator to order and award the determination of the contract without the consent of the plaintiff and the defendants, and the plaintiff's withholding his consent. That clearly is no answer to the plea; and it shews that the plaintiff was the party who prevented the arbitrator from making his second award.

Hugh Hill (with whom was *H. Lloyd*), contra. In order to constitute an equitable plea under the 83rd section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, a good answer to an action at law, it must shew that the defendant would in a court of equity be entitled to an absolute, unqualified injunction to restrain the plaintiff from proceeding against him at law. This principle, which is founded in good sense, was carried out in the case of *Mines Royal Societies v. Magnay*, 10 Exch. 489, 493, where Parke, B., says: "In

my opinion, the equitable defence allowed to be pleaded by this statute, means such a defence as would in a court of equity be a complete answer to the plaintiff's claim, and would, as such, afford sufficient ground for a perpetual injunction granted absolutely and without any conditions. But, according to the statement in the plea, a court of equity would not interfere, except upon the condition of the execution of a valid surrender by the defendant. We have no machinery by which we can compel the execution of a surrender. The statute does not say that the courts of common law may give relief on equitable conditions, but that a plea shall be allowed which discloses *a defence* upon equitable grounds." The same view was taken by the court of Queen's Bench in *Wodehouse v. Farebrother*, 25 Law Journ., Q. B. 18, where Lord Campbell, in delivering the considered judgment of the court, says,—“Under the 83rd section of the Common Law Procedure Act, 1854, we are authorised to receive this defence by way of plea, if the facts pleaded would entitle the defendant to relief on equitable grounds, in a court of equity, against a judgment obtained in this action in a court of law, no equitable defence having been set up there. The first objection to the plea, is, that the defendant does not satisfactorily shew, that, if such a judgment were obtained, he would be entitled to relief against it on equitable grounds, within the meaning of the enactment. He could only ask for a temporary or conditional injunction against suing out execution on the judgment, not for a perpetual or absolute injunction. The very important question, therefore, arises, whether, where a defendant would only be entitled to relief against a judgment to the extent of a temporary or conditional injunction, he is entitled to set up his equitable grounds of relief by way of defence in a court of law. We are of opinion, that, as yet, the legislature has

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authorised us to receive a plea disclosing equitable grounds of relief, only where the facts would entitle the defendant to an absolute and perpetual injunction against the judgment. In this last case, no difficulty occurs; for, the plea is a simple bar to the action, and we should only have to pronounce the common law judgment, 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day.' But, if the injunction is to be temporary and conditional in equity, at common law we have no such judgment, and we have no analogous judgment. We could not attempt to do justice between the parties, without pronouncing, instead of a common law judgment, an equitable decree." This court cannot pronounce a judgment "that the plaintiff take nothing by his writ, and that the defendant go thereof without day, provided the defendant will carry out the alleged substituted agreement." The plea sets up an agreement that the contract declared on shall at a future time be determined, and that a price shall be paid by the defendants to the plaintiff for that determination, to be fixed by the arbitrator. It is impossible to conceive a more incomplete agreement. It would be necessary that the reference should go on, and that the arbitrator should take all the circumstances into his consideration; and, when he has adjudicated upon the determination of the contract, he is to fix the amount of compensation the plaintiff is to receive. [*Cresswell*, J. The defendants say that the agreement to refer has been performed, except in so far as the plaintiff agreed to rescind it, and therefore there is nothing further to be done.] If the arbitrator refuses to go on, or one of the parties withdraws his assent to the arbitrator's determining the contract, they are remitted to their former position. The court will not compel the arbitrator to proceed: *Crawshay v. Collins*, 1 Swanst. 40; 3 Swanst. 90; and the rule is the same at law as in

equity; *Lewin v. Holbrook*, 11 M. & W. 110. The plea does not allege that any steps have been taken by the arbitrator towards putting an end to the contract, or that the contract has been determined. And, if the reference be still pending, how can it be said that the agreement is at an end? Besides, it does not appear that the arbitrator had power to take into his consideration breaches committed since the date of the order of reference, and before the making of his award. The plea clearly discloses no equitable defence. [*Williams, J.*, referred to *Harris v. Reynolds*, 7 Q. B. 71. There, to a declaration for goods sold and delivered, and on an account stated, the defendant pleaded a plea commencing thus:—"And for a further plea as to the first and second counts of the said declaration, the defendant saith that," &c., and alleging that, before action brought, disputes had arisen between the plaintiff and defendant whether the defendant was indebted to the plaintiff in any and what sum for the causes of action declared on, which disputes they submitted themselves to refer and did refer to arbitration, and mutually promised to fulfil the award; that the arbitrators, before action brought, took upon them the reference; that the matters in dispute were still under their consideration; and that a reasonable time had not elapsed for making the award,—concluding, "And this the defendant is ready to verify, &c.:" and it was held, on demurrer,—first, that the plea could not be considered as a plea in abatement informally pleaded,—secondly, that, as a plea in bar, it was bad, the pendency of an arbitration being no answer to an action for recovery of a debt.]

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JERVIS, C. J. It seems to me that the plaintiff in this case is entitled to the judgment of the court. Without attempting to define the form or the precise circumstances under which a court of law will admit an equit-

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able plea to enure as an answer to an action, it is plain, that, inasmuch as a judgment for the defendants here would bar the action, we cannot hold this to be a good equitable plea, unless it discloses a case in which a court of equity would grant a perpetual, unqualified, and unconditional injunction. Whether that test is applicable in all cases, it is not necessary now to inquire. No doubt, in this, as in all cases, the court will not admit an equitable plea that would carry the legal defence further than a court of equity would extend its protection to the party. What is the effect of this plea? Mr. Bovill says it discloses an absolute agreement between the parties, upon sufficient consideration, to rescind the contract, and then a reference to Mr. Bros to ascertain the compensation to be paid by the defendants to the plaintiff therefor. I think, however, it is a reference to Mr. Bros to say upon what terms the contract shall be rescinded; and then the act of parliament superadds a provision that the amount of compensation shall be paid by an allotment of the newly created stock. In truth, the plea amounts to no more than a plea of the pendency of an arbitration under an order of reference empowering the arbitrator to say upon what terms the action is to be discontinued. Although it is quite possible that a court of equity might interfere in the case put by Mr. Bovill, and might interfere to restrain the bringing of an action in violation of the compact entered into between the parties, it could only be done upon terms and conditions which we have no power of imposing or enforcing. Mr. Bovill says there is a positive agreement that no further action shall be brought upon the contract. Mr. Bros declines to proceed with the reference. What, then, is to follow? Not that no action can be brought; because that which was to put an end to the right of action is gone, viz. the determination of the contract by Mr. Bros. The plea, therefore, is clearly defective. If

it were necessary to resort to the replication, that would shew beyond a doubt that the plea cannot be supported.

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CRESSWELL, J. I am of the same opinion. The plea does not affect to set up an agreement that no action shall at any time or under any circumstances be brought for any damages sustained by the plaintiff by reason of a breach of the contract. I think the court of Exchequer, in the case of *Mines Royal Societies v. Mag-nay*, 10 Exch. 489, laid down a very sensible rule as to the nature and extent of a plea of equitable defence under the 17 & 18 Vict. c. 125. I also agree with my Lord, that, if this were a good plea, the replication affords a good answer to it.

WILLIAMS, J. I am entirely of the same opinion. The substance of the agreement relied upon in the fourth plea is no more than the substitution of the decision of the arbitrator for the judgment of the court. There is nothing to prevent the plaintiff from going on with his action if the arbitration goes off. *Harris v. Reynolds*, 7 Q. B. 71, shews that such a plea would be no bar. There certainly are some traces in the books of dicta shewing that such a plea might be good by way of *temporary bar*: (a) but I must confess I do not quite understand the distinction. It seems to me that the plea is completely answered by the replication, which shews that the substituted arbitration has gone off, and that consequently the parties are remitted to their former rights.

CROWDER, J. I am of the same opinion. The agreement set up by the fourth plea does not import an absolute and unqualified agreement that no further

(a) See the judgments of Littledale, J., and Patteson, J., in *Snook v. Mattock*, 5 Ad. & E. 239, 249.

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action shall be brought upon the contract. The real meaning is, that the matter was to be referred to Mr. Bros, with power for him to say upon what terms the contract should be put an end to. Mr. Bros, it seems, has not exercised the authority thus conferred upon him: and, as it is conceded that the only ground upon which this plea can be upheld, is, that it discloses circumstances such as would induce a court of equity to grant a perpetual, unqualified, and unconditional injunction, and as I am not satisfied that a court of equity would under the circumstances disclosed in this case grant a perpetual injunction, I think the plea cannot be supported, and consequently that the plaintiff must have judgment.

Judgment for the plaintiff. (a)

(a) The second action came on to be argued upon a writ of error in the Exchequer Chamber on the 4th of February last, — before Alderson, B., Coleridge, J., Wightman, J., Crompton, J., and Martin, B., — by *Sir Fitzroy Kelly* (with whom was *H. Lloyd*), for the plaintiff, and *Bovill* (with

whom was *R. E. Turner*), for the defendants.

The court took time to consider their judgment: but, before they had delivered it, the issues of fact in the third action came on for trial, when the whole matter was put an end to by a compromise.

1856.

HAWKER v. SIR HARRY SEALE, BART.

Jan. 15.

THIS was an action for alleged criminal conversation by the defendant with the plaintiff's wife, which was tried before Crowder, J., at the second sitting at Westminster in Michaelmas Term last, when a verdict was found for the plaintiff, damages 100*l*.

Upon a motion for a new trial in an action of crim. con., on the ground of surprise, the court will receive the affidavit of the defendant, but not that of the plaintiff's wife.

Slade, on the part of the defendant, moved for a new trial, on the ground of surprise, and upon affidavits purporting to shew that the material witnesses called on the plaintiff's part to prove the imputed acts of adultery, were unworthy of credit. Amongst others, he tendered an affidavit of the defendant himself, in terms denying that he had ever had criminal intercourse with the plaintiff's wife. [*Jervis*, C. J. Can you use that?] The 4th section of the 14 & 15 Vict. c. 99, it is true, provides that nothing in that act contained shall apply "to any action, suit, or proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage:" but here the affidavit of the defendant is offered, not for the purpose of evidence in the cause, but merely to inform and to satisfy the mind of the court, by pledging his own oath to the bona fides of the application.

JERVIS, C. J. The affidavit of the party himself was always received in these cases before the passing of the evidence act: and that statute has made no difference in this respect.

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Slade then proposed to read the affidavit of the plaintiff's wife, also denying the imputed adultery. But,

Per Curiam. That affidavit clearly cannot be used. The wife could not be called as a witness, and her affidavit is not admissible upon the ground upon which we receive the affidavit of the defendant.

This affidavit was accordingly rejected, and a rule nisi was granted upon the others.

Rule accordingly.

Jan. 31.

JAMES v. BARNES.

The court will allow interrogatories to be delivered by a plaintiff, under the 51st section of the Common Law Procedure Act, 1854, after the defendant has pleaded,—without a special affidavit.

THIS was an action for false and fraudulent representation on a sale of pictures. The action was commenced on the 8th of January, 1855; the declaration was delivered on the 13th of February; and the defendant pleaded on the 9th of March.

On the 4th of January, 1856, a summons was taken out at Chambers calling upon the defendant to shew cause why interrogatories should not be delivered to him pursuant to the 51st section (a) of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. The summons came on to be heard before Willes, J., on the 6th, when it was objected on the part of the defendant, upon the authority of *Martin v. Hemming*, 10 Exch. 478, that, in the absence of an affidavit disclosing circumstances shewing the necessity for the application, it ought not to be entertained. Yielding to the opinion expressed by Pollock, C. B., in that case, the learned judge declined to make any order, but referred the parties to the court.

(a) See the section, *antè*, p. 415.

F. Russell, on a former day in this term, accordingly obtained a rule nisi. He submitted, that the dictum of the Lord Chief Baron in the case referred to was founded upon an erroneous impression of *Finney v. Beesley*, 17 Q. B. 86, where the question arose upon the 1 W. 4, c. 22, and that the only point really argued in *Martin v. Hemming*, was, whether the court would exercise the power conferred upon them by the 51st section, by allowing the defendant to deliver interrogatories *before plea*, in the absence of special circumstances.

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Huddleston now shewed cause. The question here is, whether the court can allow a plaintiff to deliver interrogatories to the defendant after plea pleaded, without an affidavit of special circumstances. [*Jervis*, C. J. Of which there could not be the slightest doubt, but for the obiter dictum of Pollock, C. B., in *Martin v. Hemming*.] Aspland, J., in the course of the argument in that case, contended that "the 51st section entitles a plaintiff to deliver interrogatories to the defendant with his declaration, and the defendant may do the same with his plea; but, if either party seeks to do so 'at any other time,' he should satisfy the court of the necessity for such application." And Pollock, C. B., in giving judgment, adopting the argument, says,—“I think it perfectly clear, that the 51st section points to the time of the declaration as the proper period for the delivery of the written interrogatories by the plaintiff, and to the time of the plea as the period when they are to be delivered by the defendant. Whether or not, according to the true construction of this section, the court has power to allow them to be delivered at other times,—whether before or after declaration by the plaintiff, or before or after plea by the defendant,—is immaterial for the present purpose, because I think, that, upon these affidavits, that sort of case is not made out of extreme

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urgency, which, according to the principles laid down by the court of Queen's Bench in *Finney v. Beesley*, is necessary." That is a distinct authority to shew that a case of extreme urgency must be shewn to entitle a party to administer interrogatories otherwise than at the times prescribed by the statute. [*Jervis*, C. J. Where the application is before declaration or before plea, it may be that a case of extreme urgency should be shewn. But there can be no extreme urgency in a case like this.] At least, the party should shew something more than if he had come at the proper time. The court must deal with each case according to its circumstances. The very language of the 51st section seems to imply that it is incumbent on the party to give some explanation of the cause of the delay. [*Jervis*, C. J. I have spoken to my Brother Willes about this case: and he tells me that he refused the order out of deference to the opinion expressed in *Martin v. Hemming*, but at the same time intimating his own impression that there was nothing in the objection.] Then, some of the interrogatories proposed are evidently such as the defendant would not be bound to answer. [*Jervis*, C. J. The proper time to urge that objection, is, when the party comes to answer the interrogatories, as we decided yesterday, in *Chester v. Wortley*, antè, p. 410.]

Per Curiam,—

Rule absolute.

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for the court and jury on the trial of this cause to decide, shall be, whether the goods forming the subject of the third item in the particulars of the plaintiff's demand indorsed on the writ, under the date of the 3rd of March, 1853, viz. 10 gallons rum at 14s. 6d., and 6s., 7l. 11s., was sold and delivered by the plaintiff to the defendant, and whether the tender as pleaded was duly made."

At the trial, no evidence was offered on the plea of tender, and accordingly the plaintiff had a verdict upon that issue. As to the other issue, after hearing a great deal of evidence on both sides, the jury found that the defendant never was indebted beyond 15l. 18s. 6d. A verdict was thereupon entered for the defendant upon the first issue, and for the plaintiff on the second, damages 15l. 18s. 6d.

On the taxation of the costs, it was insisted, on the part of the defendant, that the plaintiff was not entitled to any costs subsequent to the summons to stay, inasmuch as the plaintiff had not recovered more than the amount thereby admitted to be due. But the master decided, that, as the defendant did not pay that sum into court, the plaintiff was entitled to the general costs of the cause: and he proceeded to tax them accordingly, deducting, however, all the plaintiff's costs relative to the first issue, a portion of the counsel's fees, and most of the witnesses. The defendant's attorney then presented a bill of costs of the issue upon which he had succeeded. The master, however, refused to look at it, but allowed the defendant nominal costs (40s.) upon the first issue.

A summons was taken out calling on the plaintiff to shew cause why the master should not review his taxation, and allow to the defendant his costs of the first issue. The summons was heard on the 1st of January instant, before Cresswell, J., who, after time taken to consider, refused to make an order.

Hawkins, on a former day in this term, obtained a rule nisi for the like purpose. He submitted, that, inasmuch as the sum offered on the summons was equal to the amount ultimately recovered by the plaintiff, the defendant was entitled to all the costs incurred after that time. [*Williams*, J. The question is, whether, where the defendant, instead of paying the sum tendered into court, pleads a plea which renders it necessary for the plaintiff to go to trial, he can have costs.] It may be that the plaintiff should be allowed the costs of the plea on which he has succeeded. [*Cresswell*, J. I took some pains when this case was before me at Chambers, but could find no authority: I therefore thought it better to leave it to the practice of the masters' office.] At all events, the defendant was entitled to have his costs of the issue upon which he succeeded taxed, instead of having merely an allowance of 40s. as upon a formal issue. [*Cresswell*, J. The master disallowed the plaintiff such portion of his costs as applied to the issue upon which he failed; and he also divided the briefs and counsel's fees, and apportioned the expenses of the witnesses.] That, it is submitted, was not enough: he was bound to go on and tax the defendant's costs of the issue which was determined in his favour.

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CRESSWELL, J. The rule may go upon the second point; but not upon the first. *Gover v. Elkins*, 3 M. & W. 216, 6 Dowl. P. C. 335, is an authority to shew, that, to entitle a defendant to call upon the plaintiff to pay costs incurred subsequently to an offer upon summons to pay a given sum, which the plaintiff declines to accept, the defendant must bring the money into court. Not having done that, the defendant has not brought himself within the rule.

Byles, Serjt., now shewed cause. The master, for

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anything that appears upon the affidavits on which the ruled was moved, has done quite right in refusing to tax any costs for the defendant upon the issue on never indebted. It does not appear that any witnesses were called exclusively on that issue. *Primâ facie*, therefore, enough has been allowed. [*Jervis*, C. J. To entitle him to ask for a review of the taxation, the defendant should have shewn by affidavit what costs the master ought to have allowed which he has not allowed. *Cresswell*, J. And he should shew that he pointed out to the master precisely what costs he insisted he was entitled to. *Jervis*, C. J. You cannot ask for a review of that which was never brought to the master's attention.]

Hawkins, in support of his rule. The affidavits shew that a bill containing what the defendant claimed as the costs of the issue upon which he had succeeded, was tendered to the master for taxation. The master declined to look at it, and decided arbitrarily that the defendant was only entitled to 40s. as the costs of the first issue.

JERVIS, C. J. I think the defendant did not make out before the master that he was entitled to anything more than was allowed him. If there was any portion of the briefs, or any evidence exclusively applicable to the issue upon which he succeeded, that should have been specifically pointed out to the master at the time. The affidavits do not shew that anything of that sort was done, and therefore the rule must be discharged.

The rest of the court concurring,

Rule discharged, with costs.

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SIMPSON and Another v. LAMB.

Jan. 14.

THIS was an action by the plaintiffs, clerical agents, to recover the sum of 750*l.* for commission alleged to be due to them for negotiating (unsuccessfully) the sale of an advowson at Iden, in the county of Sussex.

The first count of the declaration stated that it was agreed by and between the plaintiffs and the defendant, that the plaintiffs should endeavour to sell for the defendant a certain advowson situate at Iden, in the county of Sussex, for the sum of 15,000*l.*, and that, if the plaintiffs succeeded in selling the same for the said sum, the defendant would pay them a certain commission on the said sum, to wit, 750*l.*: That, afterwards, and within a reasonable time in that behalf, and before the wrongful act and revocation of authority by the defendant as thereafter mentioned, in pursuance of the said agreement, they did at the request of the defendant endeavour to sell the said advowson for the defendant for the price aforesaid, *and in and about such endeavour necessarily incurred, laid out, and expended a large sum of money, to wit, 50*l.*, which had not been repaid to the plaintiffs:* That, although the plaintiffs, from the time of the making of the said agreement to the wrongful act and revocation of authority of the defendant as thereafter mentioned, used their best endeavours to sell the said advowson for the defendant as aforesaid, for the price aforesaid, and would have sold the same as aforesaid for the price aforesaid, but for the wrongful act and revocation of authority thereafter mentioned,—of all which said several premises the defendant, at the time of the wrongful act and revocation of authority thereafter mentioned, had due notice: Yet that the defendant wrongfully and without any reasonable or probable cause whatsoever

A. employed B., a clerical agent, to offer an advowson for sale, upon an understanding, that, in the event of a sale being effected through B.'s agency, the latter should receive a commission of 5 per cent. upon the amount of the purchase-money. A. afterwards, without communicating with B., sold the living himself. In an action charging a *wrongful revocation of the authority*,—Held, that, in the absence of evidence of expense or liability incurred by B., he was not entitled to recover anything.

Quære, whether the *wrongful* revocation of the authority to sell was put in issue by "not guilty?"

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revoked the authority given by him to the plaintiffs as aforesaid, and refused and still refused to employ the plaintiffs further in selling the said advowson; whereby the plaintiffs not only lost and were deprived of the commission which would have been due and payable to them by the defendant on such sale by them as aforesaid, but also necessarily incurred, laid out, and expended a large sum of money as aforesaid in endeavouring to sell the said advowson for the defendant pursuant to the said agreement, and which sum of money had not been repaid to the plaintiffs.

There were also counts for work and materials, for commission, for money paid, and for money found due upon an account stated.

The defendant pleaded, to the first count,—first, not guilty,—secondly, that it was not agreed by and between the plaintiffs and the defendant as in the first count in that behalf alleged,—thirdly, that the plaintiffs did not at the request of the defendant, endeavour to sell the said advowson for the defendant, in manner and form as in the said first count in that behalf alleged,—fourthly, that the said agreement relating to the selling of the said advowson in the said first count mentioned, was and is a corrupt and unlawful agreement, and contrary to the form of the statute in such case made

* 31 Eliz. c. 6,
s. 8.

and provided,* for that the owner and patron of the said advowson was also before and at the time of the making of the said agreement the incumbent of the same benefice and rector of the rectory and parish church of the advowson whereof he was so owner and patron as aforesaid, as the plaintiffs then well knew; and in and by the same agreement it was corruptly and unlawfully, and contrary to the form of the statute aforesaid, agreed by and between the plaintiffs and the defendant (being the agent in respect thereof for and on behalf of the said owner and patron), that when and so soon as the plaintiffs should have succeeded in selling the said advowson

for the said sum of 15,000*l.*, and in consideration of the said sale for the price aforesaid, the said patron and owner, being also incumbent and rector as aforesaid, should resign the said benefice and rectory, and give up the possession thereof, so as to enable the purchaser to present a clerk to the said benefice and rectory, and contrary to the form and effect of the said statute.

To the rest of the declaration, the defendant pleaded fifthly, never indebted,—sixthly, that, before the said alleged cause of action in those courts respectively mentioned, or any of them, accrued to the plaintiffs, it had been and was corruptly and unlawfully, and contrary to the statute in that behalf made and provided, agreed by and between the plaintiffs and defendant,—being the agent for and on behalf of a certain person who was then the owner and patron of a certain advowson, to wit, at Iden, in the county of Sussex, and also the incumbent of the same benefice, and rector of the rectory and parish church of the advowson whereof he was the owner and patron as aforesaid, as the plaintiffs then well knew,—that the plaintiffs should procure a purchaser of the said advowson, and sell the same for the said owner and patron as aforesaid, at and for the price or sum of 15,000*l.*; and that, when and so soon as the plaintiffs should have succeeded in selling the said advowson for the aforesaid sum, and in consideration of the said sale for the price aforesaid, the said patron and owner, being then also incumbent and rector as aforesaid, should resign the said benefice and rectory, and give up the possession thereof, so as to enable the purchaser of the said advowson immediately, or soon after the completion of the said purchase, to present a clerk to the said benefice and rectory: that the work done and materials provided as in the said second count mentioned, were and are work done and materials provided in and about and for the purpose of carrying into effect the said corrupt and unlawful agreement only, in and about

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endeavouring to sell the said advowson upon the terms aforesaid, and not otherwise, or for any other or different purpose, or in any other manner: that the commission alleged to be due and payable as in the third count mentioned, was and is commission claimed upon and in respect of the same work and materials, and for and in respect of the same corrupt and unlawful agreement only, and not upon or in respect of any other work and materials, or for or in respect of any other agreement or otherwise, or in any different manner: that the money alleged to have been paid by the plaintiffs as in the fourth count mentioned, was and is money paid by them in endeavouring to carry into effect the same corrupt and unlawful agreement, and in and about endeavouring to sell the said advowson upon the terms aforesaid, and not otherwise or in any different manner, or for any other purpose, nor had the plaintiffs at any time any other authority than the same corrupt and unlawful agreement so made as aforesaid, for the payment by them of the said money in the said fourth count mentioned, or any part thereof, contrary to the form and effect of the said statute: and that the accounts alleged to have been stated as in the last count mentioned, were and are accounts stated of and concerning the same moneys so alleged to be due as in the said second, third, and fourth counts respectively mentioned, and therein so unlawfully claimed by the plaintiffs as in this plea in that behalf respectively alleged.

The plaintiffs joined issue on the first, second, third, and fifth pleas, and took issue on the fourth and sixth.

The particular of demand delivered with the declaration was as follows:—

“ 1854. Dec. To commission due from the defendant to the plaintiffs on the sale of the living of Iden, Sussex, at 5 per cent. 750*l*.”

The cause was tried before Cresswell, J., at the last assizes for Sussex. The facts were as follows:—The

plaintiffs, who are clerical agents in London, and extensively engaged in the sale of ecclesiastical preferments, on the 12th of August, 1854, inserted an advertisement in the Times newspaper for the purchase of an advowson. The defendant wrote to them on the following day, stating that he had valuable preferments to sell, and requesting an interview. On the 16th accordingly an interview took place between the defendant and one of the plaintiffs on the subject of the living, which the defendant stated to be at Iden, in the parish of Rye, in Sussex. On this occasion it was agreed that the plaintiffs should offer the living for sale; and, in answer to an inquiry as to the terms of remuneration, the plaintiffs stated their charge to be 3 guineas for registering, and 5 per cent. upon the amount of the purchase-money, payable when the contract for sale was completed: but, on the defendant's objecting to the charge, the plaintiff observed that clerical matters were generally very troublesome, and the delays great, and sometimes negotiations went off altogether, so that the agents were obliged to charge large fees to remunerate them; and he ultimately consented to waive the registration-fee. The price named at this interview was 15,000*l.*; and the plaintiff stated that he had a friend who was likely to become the purchaser.

On the 17th of August, the following letter was addressed by one of the plaintiffs, to the defendant:—

“ Sir,—My friend is in the Isle of Wight, and consequently cannot have a reply from him by the time I yesterday proposed to you: but, if you will have the goodness to draw out a sketch of the Iden property, and name a sum approaching what you would feel disposed to accept as a price, I will immediately put the matter in a train for arrangement. You had scarcely left when I had an opportunity of submitting for consideration the proposal of the next presentation of your brother's

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living. As soon as you can let me have an outline of income, and such other details as occur to your mind to be available, I will also engage to conclude this matter."

On the 29th of August, the defendant wrote the plaintiffs as follows:—

"Circumstances have occurred since my interview with you that have induced me to delay till now any further progress in the sale of Iden advowson. I gave you the general features of the living, but do not go into detail, because, on reflection, I am not inclined to accept a less sum than at first named, viz. 15,000*l.*, for the present possession of advowson, freehold property, and cottages."

On the 8th of September, the plaintiffs addressed the following letter to the defendant:—

"Sir,—We regret to inform you that the clergyman for whom we were instructed as to the Iden purchase is now no more: but we believe that very shortly we shall be in a position to dispose of the advowson on the terms of your last note, and at the price of 15,000*l.* We have to-day received an application from a most respectable London solicitor for a next presentation, with prospect of induction in the course of the next six or nine months. Now, if you will do us the favour of furnishing us with a few particulars at your earliest convenience, as to income, residence, and as to any advantages which it may occur to you to describe, we will at once put the matter in treaty."

After two or three further interviews, the defendant informed the plaintiffs that he had sold the next presentation of Iden.

There was no evidence of any specific endeavours on the part of the plaintiffs to sell the advowson, or of their having incurred any expense in reference to it: but they claimed to be entitled to a commission of 5 per cent. on the whole sum.

On the part of the defendant, it was submitted that there was nothing to go to the jury; that it was the ordinary case of a conditional undertaking to pay a given amount of commission upon the performance of a certain service; and that the plaintiffs were entitled to nothing unless they actually succeeded in selling the advowson.

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On the other hand, it was insisted that the plaintiffs were entitled to their commission, although no sale had taken place through their means, inasmuch as there had been a wrongful revocation of their authority to sell, on the part of the defendant.

The learned judge, however, thought that the defendant was perfectly justified in selling the living himself; that it was fair to presume that the large amount of commission was taken in successful cases as a sort of compensation for the risk incurred; that the plaintiffs could not recover anything unless they sold; and that that which was done by the defendant did not amount to a wrongful revocation of the plaintiffs' authority to sell: and he thereupon directed a nonsuit to be entered.

M. Chambers, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge, in ruling "that what was done by the defendant did not amount to a wrongful revocation, that there was no evidence for them, and that the defendant had a right to sell the living as he did." He submitted that the plaintiffs were entitled to claim their commission, inasmuch as the defendant had by his own wrongful act revoked the authority conferred upon them by the original employment; or that, at all events, they were entitled to recover for the actual expense and trouble they had incurred in the matter: for which he cited *Ford v. Tiley*, 6 B. & C. 325, 9 D. & R. 443,

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Hochster v. De La Tour, 2 Ellis & B. 678, and *Campnari v. Woodburn*, antè, Vol. XV, p. 400. And he further submitted that "not guilty" merely put in issue the fact of the revocation of authority, not its *wrongfulness*.

Bovill and *Badeley* now shewed cause. The authority given by the defendant to the plaintiffs to sell the living in question, was a mere naked authority, not coupled with an interest,—as in *Gausson v. Norton*, 10 B. & C. 731, 5 M. & R. 613, (a)—and therefore was in its nature revocable,—like the case of a factor to whom goods are consigned for sale, and whose authority may be revoked, although he be under advance: *Smart v. Sandars*, antè, Vol. III, p. 380, and Vol. V, p. 895. [*Jervis*, C. J. Assuming that the authority to sell was revocable, the question will be, whether the plaintiffs are not by the terms of the bargain entitled to be paid for what they had done before the revocation.] There was no evidence that they had done anything or incurred any expense in the matter. [*Cresswell*, J. The plaintiffs only claimed at the trial 750*l.*] They received an extravagantly large commission, in the event of a successful negotiation,—according to the plaintiffs' own evidence, 5 per cent. from each side,—by reason of the risk and uncertainty of the employment resulting in any profit. Could it be contended, that, in the case of a house-agent, if the landlord lets the house himself, the agent is entitled to demand commission? [*Crowder*, J. I remember a case where the agent recovered in respect of expenses actually incurred.] Suppose the defendant

(a) There, A., being indebted to B., in order to discharge the debt, executed to B. a power of attorney authorising him to sell certain lands be-

longing to him, A. : and it was held that this, being an authority coupled with an interest, could not be revoked.

had died before anything was done, would the plaintiffs have had a claim for any commission? In *Ford v. Tiley*, 6 B. & C. 325, 9 D. & R. 443, and *Hochster v. De La Tour*, 2 Ellis & B. 678, the defendants were held liable, by reason of their having made contracts which they failed to perform. In *Campanari v. Woodburn*, antè, Vol. XV, p. 400, the employment to sell the picture was held to be revoked by the death of the employer: and all that the court said, was, that possibly the plaintiff might have had a claim for compensation, if the authority to sell had been wrongfully revoked after he had incurred expense in the endeavour to sell. No evidence of that kind was given here: nor was any such claim suggested. [*Williams, J.* Do you contend that the defendant might revoke the plaintiffs' authority when they had incurred expense and trouble, without making them any compensation?] Unless there was an express bargain to that effect, they clearly would not be entitled to any compensation. The contingency of their not selling the living was amply provided for by the large commission charged on a sale. The plaintiffs are entitled to the full amount claimed, or to nothing. Nothing but an express contract not to revoke the authority could deprive the defendant of that right which every man has who employs an agent.

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Montagu Chambers and *Jacobs*, in support of the rule. No doubt, the general rule is, that a broker or other agent employed for the purpose of selling goods, of procuring a charter for a ship, or a tenant for a house, or the like, has a mere revocable authority: *Mestaer v. Atkins*, 5 Taunt. 381, 1 Marsh. 76; *Dalton v. Irvin*, 4 C. & P. 289; *Read v. Ram*, 10 B. & C. 438; *Broad v. Thomas*, 7 Bingh. 99, 4 M. & P. 732, 4 C. & P. 338. But the question here is, whether the authority of the plaintiffs to sell the living was not an

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authority coupled with an interest, so as to preclude the defendant from revoking it. *Ford v. Tiley*, 6 B. & C. 325, 9 D. & R. 443, approaches very nearly the principle which ought to govern this case. There, by agreement, A. stipulated that he would, as soon as he should become possessed of a certain public-house, execute a lease thereof to B. for fourteen or twenty-one years from the 21st of December, 1825. At the time of making the agreement, the house was upon lease which would not expire until Midsummer, 1827,—the legal estate being in trustees, first, to pay debts, and then to pay an annuity, and, subject thereto, to the use of A., if he attained the age of twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees joined in a lease to C. for twenty-three years: and it was held, that A., having thereby put it out of his power, so long as the latter lease (of 1825) subsisted, to grant a new lease to B., had committed a breach of his agreement, and was liable to an action for such breach, although the first lease had not expired. In *Campanari v. Woodburn*, antè, Vol. XV, p. 400, the facts were these: A. agreed with B. that he would endeavour to sell a picture belonging to B., and that, if he succeeded in selling it, B. should pay him 100*l.*: B. died before the picture was sold: the picture being afterwards sold by the administratrix of B., A. sued her for 100*l.*: and she was held not to be liable. But Jervis, C. J., suggests, that, though not entitled to the 100*l.*, “possibly the plaintiff might have had a remedy for a breach of the contract, if the intestate had wrongfully revoked his authority after he had been put to expense in endeavouring to dispose of the picture.” This is in accordance with what is laid down in Story on Agency, § 329,—“The general rule of law as to commissions, undoubtedly, is, that the whole service or duty must be performed before the

right to any commission attaches, either ordinary or extraordinary; for, an agent must complete the thing required of him before he is entitled to charge for it. But cases may occur in which an agent may be entitled to a remuneration for his services in proportion to what he has done, although he has not done the whole service or duty originally required. This may arise either from the known usage of the particular business, or from the entire performance being prevented by the act or neglect of the principal himself." (a) Here, the sale was clearly prevented by the act of the principal himself. [*Jervis*, C. J. The question is, what was the original bargain? The evidence is, that the plaintiffs were to have a certain commission, in the event of their finding a purchaser for the living.] They are not to be deprived of all remuneration, if they are by the act of the principal deprived of the opportunity of selling. In the notes to *Cutter v. Powell*, in 2 Smith's Leading Cases, 17, it is said,—“The next exception to the general rule, that no action of indebitatus assumpsit will lie while the special contract remains unperformed, is to be found in a class of cases which establish, that, where one party has absolutely refused to perform, or has incapacitated himself from performing, his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a quantum meruit.” In *Planché v. Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, 5 C. & P. 58, the defendants engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the treatise, but, before he had completed it, the defendants abandoned the periodical publication: and it was held that the plaintiff might sue for compensation, without delivering or tendering the treatise. *Holme v. Guppy*, 3 M. & W. 387, is to the same effect.

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(a) And see §§ 476, 477.

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In an American case, *The United States v. Jarvis, Davies* Rep. 274, it is laid down as an universal principle of law founded in natural equity, that, though the power of an agent may be revoked at any time by the principal, without notice, yet, if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before notice of the revocation of his powers, entered into any engagements, or come under any liabilities, the principal will be bound to indemnify him. The language there used by Justice Ware is very applicable to the present case. "There is no doubt," he says, "as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving any reason for it, because it is the right of every man to employ such agents as he sees fit. The agent also has the same general right to renounce the agency at his own will: for, it is an engagement at the will of both parties. But the contract of agency, or mandate, involves mutual obligations between the parties; and these commence, if not as soon as the appointment is made, at least as soon as the agent or mandatory commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled, from his principal, to an indemnity for his expenses and services, if the failure does not arise from his own fault: Domat, Lois Civiles, Liv. 1, Tit. 15, § 2, Art. 1. 2. After he has engaged in the business of the agency, the principal may at any time revoke his powers, and dismiss him from his service. But, if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into, and any liabilities he may have incurred in good faith, in the proper business of the agency, before he had notice of the revocation: Domat, Lois Civiles, Liv. 1, Tit. 15, § 4, Art. 1." Here, the plaintiffs were at all events clearly

entitled to recover some compensation for the trouble they had incurred. It may be that they were not entitled to much; but that was a question for the jury. [Cresswell, J. If I had been asked to put that to the jury, there can be very little doubt what their answer would have been. There was no evidence of any contract to pay a reasonable compensation if the authority to sell were revoked: and certainly none of any expense incurred or any liability contracted by the plaintiffs in relation to the sale.] Then, not guilty puts in issue the fact of the revocation of authority, but not its wrongfulness: *Frankum v. The Earl of Falmouth*, 2 Ad. & E. 452; *Renshaw v. Bean*, 18 Q. B. 112. This is not like trover, where not guilty has been held to put in issue the "wrongful conversion:" *Young v. Cooper*, 6 Exch. 259. [Cresswell, J. This point was not made at the trial: if it had been, I certainly should have allowed an amendment.]

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JERVIS, C. J. I am of opinion that the rule should be discharged. With regard to the last point urged by Mr. Jacobs, viz. that "not guilty" puts in issue the fact of the revocation of authority, and admits the rest, it is unnecessary to give any opinion on that point, as it was not made at the trial, though I must confess I entertain no doubt about it. It is enough, however, to say that the point was not suggested at the trial, nor by Mr. M. Chambers when he moved the rule. On the contrary, the case was moved upon the assumption that the alleged wrongful revocation was put in issue.

As to the other point, I think there can be no doubt that the authority was revocable: but that does not carry with it an absolute right on the part of the principal to revoke without reinstating the agent where his position has been altered; that will depend upon the terms of the original employment. I take it to be ad-

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mitted that it is not competent to a principal to revoke the authority of an agent, without paying for labour and expense incurred by him in the course of the employment. The right of the agent to be reimbursed depends upon the terms of the agreement. A general employment may carry with it a power of revocation on payment only of a compensation for what may have been done under it; but there may also be a qualified employment under which no payment shall be demandable if countermanded. In the present case, I think the evidence shewed that the employment was of that qualified character,—like the case of the house-agent or the ship-broker,—the plaintiffs undertaking the business upon an understanding that they were to have nothing if they did not sell the advowson; taking the chance of the large remuneration they would have received if they had succeeded in obtaining a purchaser. I think that was the fair effect of the evidence, and that my Brother Cresswell was quite right in the view he took. If the case rested on the plaintiffs' right to claim a compensation for work done and money paid, I am of opinion that there was no evidence of that here. The evidence was, that it was the plaintiffs' practice to charge a fee of three guineas for entering the property to be sold in their register-book. Possibly they might have been entitled to claim that, if this had been a general employment. But, inasmuch as the sum to be asked for the living was large, and the plaintiffs would consequently receive a very considerable remuneration in the event of a purchaser being found, they waived that fee, and agreed to register the living for nothing, and to do gratis those services for which in ordinary cases the registration fee was considered an equivalent. I think that fee would amply cover all that the plaintiffs were shewn to have done here. There was no evidence that they did anything more than the three guineas would have been

a full equivalent for; and, as that was waived, I think there is no ground for contending that they are entitled to anything.

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WILLIAMS, J. I am of the same opinion, though I have entertained some doubt as to the correctness of the rule laid down in Story on Agency, § 379. Looking, however, at the peculiar nature of the employment here, and the scale of remuneration in the event of a negotiation terminating successfully, I think it clearly was incidental to the employment that the plaintiffs' authority might be revoked at pleasure by the defendant, unless something had been done upon it, or some expense had been incurred by the plaintiffs in furtherance of it. I therefore think Mr. Chambers very properly put it as he did. But it seems to me that it was an implied term in the bargain,—or, at all events, that there was evidence for the jury that it was an implied term,—that the plaintiffs were to be paid something for abortive attempts to sell: and, if the case had gone to the jury, possibly they might have been justified in finding that there was such a contract; or, it may be, as is put by my Lord, that the arrangement excluded anything more than the three guineas in the shape of remuneration, in consideration of the large commission the plaintiffs would have received in the event of the negotiation being through their means brought to a successful issue. But, upon the whole, I do not think the plaintiffs relied upon the more limited view, but brought their action in assertion of the larger claim only: and it would be wrong to send the cause down to a new trial on account of the very trifling remuneration to which it is now said they were entitled.

CROWDER, J. I also am of opinion that this rule should be discharged. The action was evidently brought

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to recover the whole amount of the commission agreed to be paid on the sale of the advowson. The quantity of labour shewn to have been bestowed by the plaintiffs in their alleged attempts to negotiate, was evidently too insignificant to be worth notice. I think no action could be maintained merely on the ground of the revocation of the authority. To entitle them to recover anything on that score, the plaintiffs were bound to shew that some damage resulted to them from such revocation. I think the rule is correctly laid down by Dr. Story. If it could be shewn that the agent is by the wrongful act of the principal prevented from carrying out the work on which he is employed, he would be entitled to a reasonable remuneration for what he had done. But I cannot see any evidence here upon which the jury could act. The whole question was, whether the plaintiffs were entitled to recover the 750*l*. It would have been perfectly idle to have left any other question to them.

CRESSWELL, J., concurring,

Rule discharged.

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WIELER v. SCHILIZZI.

Jan. 15.

THIS was an action for an alleged breach of a contract for the sale of certain parcels of linseed described as Calcutta linseed.

The first count of the declaration stated, that, by agreement between the plaintiff and the defendant, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy of the defendant, certain parcels of goods by certain ships, that is to say, amongst other ships, by the ships *Gloriosa*, *Albatross*, and *Highlander*, at certain prices, and by the said agreement the defendant warranted the said goods respectively to be Calcutta linseed; and that, although before the suit the plaintiff did and performed all matters and conditions, and all matters and conditions happened and were performed, and all time elapsed, which respectively were necessary to be done or performed or to elapse in order to entitle the plaintiff to have the said agreement and warranty performed by the defendant before this suit; and although the defendant caused to be delivered to the plaintiff the said parcels of goods by the said three ships above specified: yet the defendant, before this suit, disregarded his promise, and broke his said warranty, in this, that the said parcels so delivered, to wit, parcels by the said ships *Gloriosa*, *Albatross*, and *Highlander*, respectively, were not Calcutta linseed, and were respectively in great part composed of substances other than and inferior in value to Calcutta linseed, and the defendant never delivered to the plaintiff parcels of Calcutta linseed by or out of the said three ships above specified, or any of them, in pursuance of his said contract and warranty; and by reason of the premises part of the said goods so delivered were

Upon a sale (not by sample, and without warranty,) of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract.

Thus, where A. bought of B. a cargo of "Calcutta linseed, tale quale,"—Held, that the contract was not satisfied by the delivery of linseed, though coming from Calcutta, which contained so large an admixture of other inferior seeds as to have lost its distinctive character of Calcutta linseed.

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wholly valueless to and unsaleable by the plaintiff, and, as to and in respect of the residue thereof, the plaintiff was unable to obtain the same prices that otherwise he would have done, and was obliged to and did before suit sell the same at greatly reduced prices.

There was also a count for money paid, money received, interest, and money due on accounts stated.

The defendant pleaded, to the first count, that he did not promise or warrant as alleged, and a denial of the breaches as alleged; and, to the second count, never indebted, payment, and set-off.

The cause was tried before Jervis, C. J., at the sittings in London after last term. The facts were as follows:—The defendants, who were merchants carrying on business at Calcutta and in London, on the 18th of November, 1854, through their brokers entered into the following contract with the plaintiff:—

“London, 18th November, 1854.

Sold-note.

“Sold for account of Messrs. Schilizzi & Co., to Mr. W. Wiener, the following parcels of *Calcutta linseed*, viz.

“ Per Thalestris,	about 210 tons,	bill of lading dated July last.
„ Mersapore,	„ 100	„ „
„ St. Abbs,	„ 18	„ „

all at 65*s.* 6*d.* per quarter, and

“ Per Gloriosa,	about 100 tons,	bill of lading dated Sept. last.
„ Albatross,	„ 100	„ „
„ Highlander	„ 10	„ „

all at 66*s.* per quarter, the cost, free on board, and the freight, insurance, and packages to London included,—*tale quale*. The amount of each invoice to be paid in fourteen days from each ship's reporting, by cash, less 2½ per cent. discount, in exchange for shipping documents and freight release. Buyer is to have craft alongside each ship as soon as each parcel of seed is ready to discharge, or it is to remain at his risk and expense.

Buyer is to pay to sellers on the 20th instant, in part payment of the above-named seed, a deposit of 1000*l.*, which is to be apportioned and deducted from each invoice as follows, viz. 5*s.* per quarter on the July shipments, and the remainder in equal proportions on the September shipments. Should buyer fail to pay for the whole or any part of the above-named seed on arrival, as stated, sellers are to be at liberty to sell such part, without further notice, at buyer's risk ; who is to make good any loss that may accrue in consequence of such sale. Interest at the rate of 5 per cent. per annum to be allowed on the deposit. Should any of the above-named ships be lost, the deposit on such parcels to be immediately returned, with interest, as stated.

“ Laing & Campbell, Brokers.

“ £1000 paid 20th Nov., 1854.”

On the arrival of the seed, the buyer objected to the quality, complaining that it contained a large admixture of rape and mustard seed, and therefore was not, in accordance with the terms of the contract, “ Calcutta linseed.”

It appeared from the evidence that no seed comes to market without some mixture, the average being generally about two or three per cent. ; but, according to the evidence of the plaintiff's witnesses, the linseed in question contained about fifteen per cent. of tares, rape, and mustard. The defendants' witnesses, on the other hand, stated, that, though of somewhat inferior quality, the seed did answer the description in the contract.

It further appeared, however, that the plaintiff had sold it as and for “ linseed :” and the crushers to whom it was sold proved that it had been used by them as such, and that the cake was sold as linseed-cake.

On the part of the defendant, it was submitted, that the contract,—which contained no warranty, but which

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distinctly intimated to the purchaser that he was to take the seed as it was,—was satisfied by the delivery of that which was known in the market as, and which in point of fact was, “Calcutta linseed,” however inferior in quality, and however adulterated.

For the plaintiff, it was insisted, that, to the extent of the mixture of foreign seeds, the article delivered was not linseed at all within the meaning of the contract.

In submitting the case to the jury, the Lord Chief Justice told them, that the question for them to consider, was, whether the plaintiff got what he bargained for,—whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract,—more, in truth, than might reasonably be expected.

The jury returned a verdict for the plaintiff,—the amount of damages being by agreement referred.

Montague Smith now moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. The defendant was guilty of no breach of his contract, if he supplied that which was known and usually sold in the market as Calcutta linseed. There was no warranty, and no fraud. No doubt it was of inferior quality. [*Cresswell*, J. What was inferior,—the linseed, properly so called? or the cargo?] The cargo. [*Jervis*, C. J. I left it to the jury, in substance, to say whether the article was so mixed as to lose its distinctive character, or whether it was such as to answer the description in the market, of Calcutta linseed.] His lordship went on to say,—and that is the direction complained of,—“was it (that is, the mixture or adulteration,) more in truth than might reasonably be expected?” Now, there being no warranty, if this was Calcutta linseed of any quality, however inferior, the plaintiff got

what he bargained for. The rule is well expressed by Lord Ellenborough in *Gardiner v. Gray*, 4 Camp. 144. That was the case of a contract for the sale of twelve bags of waste-silk, without any warranty that it should correspond with the sample. And his lordship, in leaving the case to the jury, said,—“ I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be super-added by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk should correspond with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste-silk*. The witnesses describe it as unfit for the purposes of waste-silk, and of such a quality that it cannot be sold under that denomination.”

CRESSWELL, J. I am utterly unable to discover any misdirection in this case. It is suggested that my Lord was wrong in telling the jury that the question for them

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to consider was, whether the linseed delivered contained a greater admixture of foreign substances than might reasonably be expected; and that he should have left it to them simply to say whether or not it answered the description of Calcutta linseed. But I think that what my Lord meant, and what the jury must have understood, was, that they were to say whether the article delivered reasonably answered the description of Calcutta linseed, that is linseed with a reasonable amount of adulteration only. My Lord does not express himself dissatisfied with the verdict: and I see no reason why we should be so. I think there should be no rule.

CROWDER, J. I also think there was no misdirection. Looking at the whole course of the evidence, it appears to me that the jury were rightly told to consider whether the amount of adulteration was greater than the plaintiff might reasonably expect. That expression was not used, as Mr. Smith suggests, as a qualification of the rule of law. The jury in effect found that the article delivered did not reasonably answer the description in the contract: and, as my Lord Chief Justice is not dissatisfied with the verdict, I see no ground for quarrelling with it.

WILLES, J. The jury have in substance found that the linseed in question was so mixed with seeds of a different and inferior description as to have lost its distinctive character and prevent its passing in the market by the commercial name of Calcutta linseed. The purchaser had a right to expect, not a *perfect* article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for. As, if a man buys an article

as gold, which every one knows requires a certain amount of alloy, he cannot be said to get gold, if he gets an article so depreciated in quality as to consist of gold only to the extent of one carat.

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JERVIS, C. J., concurred.

Rule refused.

DAVIS v. JONES and Others.

Jan. 19.

THE first count of the declaration charged the defendants with breaking and entering the plaintiff's house, and continuing therein till the plaintiff paid them a certain sum of money. The second count was for an excessive distress. The third stated, that, in consideration that the plaintiff would sign a written instrument purporting that the plaintiff agreed to rent a house of the defendants, the defendants agreed to do certain repairs thereto, and that, until such repairs were done, rent was not to be payable; and averred that thereupon the plaintiff signed the agreement, and entered upon the premises, and did all things necessary to entitle her to have the repairs done; and alleged for breach, that, although the repairs were not done, the defendants distrained for rent. The fourth count was for money had and received, and the fifth for money due on accounts stated.

Parol evidence is admissible to shew that a written contract which has no date, was not intended to operate from its delivery, but from a future uncertain period.

The defendants pleaded,—first, to the first and second counts, not guilty, by statute,—secondly, to so much of the second count as related to breaking and entering the house, *liberum tenementum* in the defendant Thomas Jones, and that the others acted as his servants and by his command,—thirdly, to the third count, a traverse of the promise therein alleged,—fourthly, to the same count, that the repairs were done as alleged,—fifthly, to the same

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count, a denial of any distress whilst the repairs were unfinished—sixthly, to the same count, that the written instrument therein mentioned to have been signed by the plaintiff had continually after such signature, and after the entry by the plaintiff into the said house, been, and and still was, in full force; that the said instrument was in the words and figures following, that is to say, “Liverpool, October 1, 1853. Mrs. Roseanna Louisa Davis, of this town, has this day agreed to rent from Thomas Price Jones, and to occupy as tenant, a dwelling-house near Norwood Grove West, Derby Road, Liverpool, at the rent of 30*l.* per annum, *for three years*, payable quarterly, and in advance, and to be paid in that time, or in any part of the same, if demanded. It is likewise agreed, *that, after the expiration of three years, three months’ notice of quitting shall be given in writing by either of the parties to this agreement.* The tenant shall not underlet any part of the said house, nor give up possession of the same, without the consent of the landlord or his agent, in writing; and if at any time the house is left unoccupied, and the furniture be removed therefrom, the said landlord or his agent shall have liberty to enter and take full possession thereof. All the fixtures to be left in good condition and repair, and all windows that may be broken during the tenant’s holding possession of the said house shall be made good by him. I, the tenant of the above-mentioned house, in default of payment or payments as above mentioned, do hereby agree to be turned out of the said premises by force, and whatever goods there are on the premises shall be taken to defray all expenses the landlord shall be put to, and the full possession shall be given up to the landlord, and no action or actions to commence against him for so doing. Signed under our hands, T. P. Jones, per Edward Morris. Louisa Roseanna Davis. Witness, Ebenezer Morris.” The plea went on

to aver, that, after entry by the plaintiff, and before distress, rent became due under the agreement to Thomas Jones and Thomas Price Jones, or one of them, and that they, as landlords, and Hugh Price, as their bailiff, distrained; and that no other agreement in writing for renting or repairing the said house was ever entered into or signed by the plaintiff.

There was also a seventh plea, of leave and licence, to the first, second, and third counts; and an eighth, of never indebted, to the rest of the declaration.

Upon each of these pleas issue was joined.

The cause was tried before Platt, B., at the last Summer Assizes at Liverpool. The facts were as follows:— Thomas Jones was possessed of some houses, and his son, Thomas Price Jones, had given Morris a general authority to let and to manage them. In May, 1853, the plaintiff was desirous of taking one of the houses, but required certain alterations and repairs to be made therein; and accordingly, at a meeting at which the plaintiff, Morris, and Thomas Price Jones were present, it was agreed that the plaintiff should become the tenant, and Thomas Price Jones promised that the repairs should be done, and desired Morris to do them. The landlord, however, not supplying the requisite funds, considerable delay took place in effecting the repairs, and the plaintiff was about to decline taking the house, when, in October, 1853, Morris proposed that she should sign the agreement set out in the sixth plea, and take possession of the house at once. The plaintiff at first objected to sign the agreement, on the ground that she might thereby become liable for rent; but ultimately she was persuaded by Morris to sign it; and, at Morris's request, she afterwards advanced money to complete the repairs, he giving her a receipt in the following form:—

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"Liverpool, November 1st, 1853.

"Received from Mrs. Davis, the sum of thirteen pounds, being part payment of half-year rent in advance on house No. 1, Norwood Grove, as per agreement, towards putting the said house in tenantable repair; and the balance, five pounds, *and the rent to commence when the date of the said repairs completed*: to have hot and cold bath, and painted and papered all through, and all other requisite repairs.

"T. P. Jones

"Per Edward Morris."

The repairs were never completed; and the distress complained of was levied on the 24th of November, 1854.

The part of the agreement in the plaintiff's possession was produced. It was not dated. The other part was said to be lost; but there was evidence that the copy handed by Morris to Jones bore date the 1st of October, 1853.

Evidence was offered on the part of the plaintiff, and objected to by the defendants' counsel, but received by the learned judge, to shew the circumstances under which the plaintiff had signed the agreement. Morris, who was called, stated that he told her she was not to be liable for rent until the repairs were completed, and that the date should not be inserted until they were completed, and that the agreement would not render her liable for rent until the date was put in; and that, upon that representation, she consented to sign it.

A verdict having been found for the plaintiff,

Milward, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misreception of evidence, and misdirection. He submitted that the written agreement must speak for itself, and could not

be contradicted or varied by contemporaneous conversations.

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Edward James and Heath now shewed cause. The evidence established the fact that the memorandum set out in the sixth plea was not the agreement entered into between the parties, but that the real agreement was that which passed between plaintiff and Morris, the landlord's agent, at the time she signed the memorandum. If so, it clearly was competent to the plaintiff to give evidence of all that passed. It is by no means an unusual thing to let premises under a verbal agreement, subject to certain terms which are reduced into writing. [*Jervis*, C. J. My present impression is, that the paper contained the terms of the taking, all except the time when the tenancy was to commence, which was by parol.] That clearly is the effect of the evidence. We put in the memorandum, not as a binding document, but, in conjunction with what passed orally at the time, to shew what were the real terms under which the plaintiff entered upon the premises. That it was competent to the plaintiff to give such evidence, is clear. In 2 Taylor on Evidence, 2nd edit. p. 896, it is said that parol evidence may be given to shew "that an instrument is altogether void, or that it never had any *legal* existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution or delivery,"—citing *Collins v. Blantern*, 2 Wils. 341; Smith's Leading Cases, 154—170; *Parson v. Popham*, 9 East, 421. Many cases are to be found where contemporaneous parol representations have been allowed to explain the terms of a bargain. Thus, in *Dobell v. Stevens*, 3 B. & C. 628, 5 D. & R. 490, where the vendor of a public-house made, pending the treaty, certain deceitful representations respecting the amount of the business done in the house, and the rent received

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from a part of the premises, whereby the plaintiff was induced to give a large sum for the premises,—it was held that the plaintiff might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises, or in a written memorandum of the bargain, which was drawn up after those representations were made. So, in *Mechelen v. Wallace*, 7 Ad. & E. 54 (b), M. agreed verbally with W.'s agent to take a house of W., furnished, at 170*l.* a year rent for the house and furniture, payable quarterly, and in advance. The house was furnished only in part, but the agent said that it should be completely furnished; not, however, specifying any time. M. was let into possession within a month from the above treaty. After the expiration of a quarter, W. distrained for the rent, the furniture not having been sent in as promised. M. brought trespass: and the court held that it was a question for the jury whether the agreement to pay rent was absolute, or on condition only of the furniture being sent in; that there was evidence upon which they might find it to have been conditional; and therefore that the distress was not justified. Here, the receipt, given on the 1st of November, shews that the rent was not to commence until the repairs were completed. Then, the agreement, being for more than three years, and not being by deed, was void by the statute 8 & 9 Vict. c. 106, s. 3: *Stratton v. Pettitt*, antè, Vol. XVI, p. 420. [*Cresswell*, J. Can we infer that it was for a term exceeding three years?] The original term is three years, and there is a proviso, that, *after* the expiration of three years, three months' notice to quit shall be given by either party. The term, therefore, necessarily must enure for three years and a quarter.

Milward, in support of his rule. A lease not under seal, though void *as a lease* by the 8 & 9 Vict. c. 106,

s. 8, may still be used as evidence of the terms of the tenancy: *Tress v. Savage*, 4 Ellis & B. 36. Coleridge, J., in delivering the judgment of the court, says,—“The argument turned upon the effect of the two statutes, 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106. By s. 4 of the former act, no lease in writing of any freehold land ‘shall be valid as a lease,’ ‘unless the same shall be made by deed; but any agreement in writing to let’ ‘any such land shall be valid and take effect as an agreement to execute a lease;’ ‘and the person who shall be in possession of the land in pursuance of any agreement to let, may, from payment of rent, or other circumstances, be construed to be a tenant from year to year.’ Under this section, *Doe d. Davenish v. Moffatt*, 15 Q. B. 257, was decided. There, the defendant took possession of the land under the terms of a written agreement not under seal, which, before the statute 7 & 8 Vict. c. 76, came into operation, would have operated as a demise for three years: and it was held that he became tenant from year to year, subject to the terms of the agreement; and that the consequence of this was, that, at the end of the three years, the tenancy expired without any notice to quit. That statute is repealed by stat. 8 & 9 Vict. c. 106; s. 8 of which substitutes for s. 4 of the repealed act an enactment somewhat differently expressed, and makes a lease, required by law to be in writing, of tenements or hereditaments, ‘void at law, unless made by deed.’ It seems to us that the intention of the legislature is clear in both statutes. The intention was, that leases should not be made except by deed. The first statute did this ineffectually: it erred in excess, by including, not merely leases of land which by the previous law were required to be in writing, but all leases in writing; and, further, it gave to the unsealed lease the effect of an equitable lease. This it was intended to remedy by the second statute,

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which makes such leases of land as must be in writing, and are not made by deed, void *as leases*, leaving the effect in all other respects as it was before either act passed. It seems to us, therefore, that the party entering into possession under such an instrument, is in the same position as that in which he would have been before the acts. He has not a lease, nor a tenancy for the three years and a week ; but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. Nothing in the terms of the statute 8 & 9 Vict. c. 106, s. 8, is inconsistent with this." [Cresswell, J. In *Stratton v. Pettitt*, we held the instrument to be altogether void, if not made by deed. The 8 & 9 Vict. c. 106, s. 8, was intended to cure a defect in the 4th section of the former act, under which, though void as a lease at law, the instrument might be used as a contract for a lease in equity. You contend that it still may be used to enforce the contract in equity?] Yes. [Cresswell, J. You must address that argument elsewhere.] However doubtful may be the construction of the second sentence of the memorandum, it does not make the contract enure for more than three years. It clearly was evidence of the mode of holding, and no parol evidence could properly be received to contradict it. *Jervis*, C. J. Suppose the paper had been signed by both parties, and, at the time of execution, it was stipulated by parol that the tenancy should not commence for two months; would that not be admissible?] Clearly not. [*Jervis*, C. J. Why not?] Because it would be letting in parol evidence to contradict a contract in writing. [*Jervis*, C. J. No. The time for the commencement of the holding being upon the face of it uncertain.] There are two cases upon the subject which seem to be expressly in point. In *Styles v. Wardle*, 4 B. & C. 908,

6 D. & R. 507, it was held, that, where a deed has no date, or an impossible date, as, the 30th of February, and in the deed reference is made to the *date*, that word must be construed *delivery*: but, if it has a sensible date, the word *date* occurring in other parts of the deed, means the day of the date, and not of the delivery. [*Jervis*, C. J. There is no doubt about that.] In *Williams v. Jones*, 5 B. & C. 108, 7 D. & R. 549, an attorney entered into a written contract whereby he agreed to take into partnership in the business of an attorney a person who had not at that time been admitted: no time was expressly fixed for the commencement of the partnership: and it was held, that, no time being expressly appointed, the partnership commenced from the date of the agreement; that parol evidence was properly admitted to shew that the person taken into partnership was not an attorney at the time when the agreement was executed; but that it could not be received to shew that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from that which it purported to be, viz. an agreement for a *present* partnership. Bayley, J., in giving judgment, says: "Where a written contract has been entered into, the court must look to that, in order to ascertain the meaning of the parties; and we are not at liberty to admit the introduction of parol evidence to shew that the agreement was in reality different from that which it purports to be." And Holroyd, J., says: "Whatever may have been the intent of the parties, which I collect to have been that the instrument should take effect immediately, at all events the law gives it that effect, no time for its commencement being mentioned in the instrument. Parol evidence was properly admitted to shew that the agreement was illegal, but not for the purpose of varying the contract, by adding to or diminishing from it."

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JERVIS, C. J. I am of opinion that this rule should be discharged, because, though it is true the instrument contains a certain portion of the terms of the holding,—and so far parol evidence is not admissible to vary or control it,—yet it does not contain any of the terms sought to be introduced by the evidence which was objected to: it does not shew the time from which the tenancy was to commence. The agreement begins,—“Mrs. R. L. Davis has this day agreed to rent from T. P. Jones, and to occupy as tenant, a dwelling-house, &c., at the rent of 30*l.* per annum, for three years,”—not saying from what time. But it was expressly proved that it was agreed at the time that the rent was not to commence until the repairs were completed. A written instrument does not necessarily operate from delivery: it is competent to a party to shew that it was delivered as an escrow, and that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event. That was expressly decided in *Murray v. The Earl of Stair*, 2 B. & C. 82, 3 D. & R. 278. There, a subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: and the court held that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the securities were delivered up. That is precisely this case. It was perfectly competent to the plaintiff,—the agreement being silent on the subject,—to shew by parol testimony that it was not

intended to take effect until the happening of something else. I think my Brother Platt was quite right in receiving the evidence.

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CRESSWELL, J. I am of the same opinion. I think it is quite impossible to contend, after the decision in *Murray v. The Earl of Stair*, that the plaintiff might not shew that the agreement, though signed by her, was not to be operative until something else was done. Morris proved that it was agreed between himself and the plaintiff at the time that the rent was not to commence until the date was filled in, and that the date was not to be inserted until the completion of the repairs. The evidence was clearly admissible.

CROWDER, J. I am of the same opinion. The instrument was in itself imperfect, being without a date. If, however, it had been signed and delivered, and no explanation had been given, it would have been taken to speak from its execution. The circumstances of the case clearly shew that this instrument is not to be dealt with in that way. The attesting witness accounted for the want of date, by proving that the instrument was not intended to be binding from the time of its execution, but from the time of the completion of the repairs. It would be a gross fraud upon the plaintiff if it were otherwise.

Rule discharged,

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A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed. The true question is, for what purpose were they called?

A commission was taken out by the defendant to examine a witness at Paris. At the trial, the plaintiff's counsel abandoned that part of his case to which the evidence under the commission applied, and the defendant had a verdict on that issue:—Held, that the defendant was entitled to the costs of the commission.

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THIS was an action by an indorsee against the acceptor of two bills of exchange, and the maker of a promissory note.

The declaration contained three counts; the first two upon separate bills of exchange drawn respectively by one James Frederick Allen upon and accepted by the defendant; and the third upon a promissory note made by the defendant, payable to Allen or order, and by him indorsed.

The defendant pleaded six pleas; the first four in substance alleging that the bills and note were respectively accepted and made by the defendant for the accommodation of the drawer and payee, one James Frederick Allen, deceased; and the fifth and sixth being pleas of fraud.

The cause was tried before Jervis, C. J., at the sittings in London after last Michaelmas Term, when a verdict was found for the defendant upon the issue raised in the second plea to the second count of the declaration, and for the plaintiff upon all the other issues, damages 200*l*.

At the trial the plaintiff attempted to prove that the bills and note were not accommodation bills; and for that purpose the diary of Allen, containing a statement of account with the defendant, with the defendant's writing therein, shewing a balance of 179*l*. 6*s*. 8*d*. due from him to Allen, which appeared from the book to have been further increased to 524*l*. or thereabouts, was put into the defendant's hands while under examination; when the defendant swore that he had paid the same, by giving Allen a bill of Sir Robert Clifton's for 500*l*.

In March, 1854, a commission was issued on behalf of

the defendant, for the examination of one Adolphe Laurier and Sir Robert Clifton, at Paris. The plaintiff did not join in the commission, but he attended thereon by counsel and attorney. Laurier on his examination proved, *inter alia*, that he discounted the 500*l.* bill for Allen, and that the same was paid. The evidence so given under the commission was read, and the bill produced at the trial. Before the evidence of Laurier was read, the plaintiff's counsel abandoned the second count: the defendant's counsel, however, insisted upon having it read, and it was read accordingly.

Upon the taxation of costs, the plaintiff's attorney claimed, as part of the costs of the cause, the costs of attending the execution of the commission in Paris, alleging that the evidence taken under such commission was applicable and had reference to, and was applied and used by the defendant in support of, *all the pleas upon the record*, and particularly respecting the payment of the 500*l.* bill by Sir Robert Clifton, in order to prove that the bills in question in the cause were accommodation bills, and not solely in support of the allegation in the second plea to the second count, that the bill was a spent bill; and that the commission was issued by the defendant for the examination of Laurier and Sir Robert Clifton for other purposes than that of proving that the bill mentioned in the second had been renewed and re-issued without a new stamp; and that such evidence was used and read at the trial after the plaintiff's claim upon the bill mentioned in the second count had been abandoned by the plaintiff; and that it had been used by the defendant in support of *all* the pleadings, and especially in support of the third plea.

The master disallowed the plaintiff these costs, and allowed the defendant his costs of attending the commission.

Upon an affidavit stating the above facts, and also

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stating that the evidence given under the commission was used by the defendant at the trial to shew that all the bills in question in the cause were accommodation bills, and that the frequent renewals, as stated in the evidence of Laurier, of the bill which had been abandoned, was evidence to go to the jury of an agreement between the parties not to negotiate them after they were due; and that, the Lord Chief Justice having refused to submit such evidence to the jury, the defendant's counsel tendered a bill of exceptions,—

Wood, on a former day in this term, obtained a rule calling on the defendant to shew cause why the master should not be at liberty to review his taxation. He submitted that the defendant was not entitled to any expenses of witnesses, unless *exclusively* applicable to the issue upon which he succeeded; referring to *Clothier v. Gann*, antè, Vol. XIII, p. 220. [*Jervis*, C. J. The substance of Laurier's evidence under the commission, was, that the bill which was the subject of the second count, had been paid, and afterwards re-issued. I ruled that it had nothing to do with the other bills.]

G. Hayes now shewed cause. There is no pretence for this rule. The evidence given under the commission had no bearing whatever on the case, except as to the issue on which the defendant succeeded; and so his Lordship ruled. If the mere fact of the evidence upon one issue having some slight application to other issues, be held to disentitle a party to the costs as costs of an issue upon which he has succeeded, the rule as to apportionment of costs of issues will be altogether nugatory. [*Williams*, J. A shrewd advocate might always evade it by the course of his cross-examination.] It must always be a matter for the master's discretion, whether the evidence is applicable to a particular issue, or to the cause

generally. In the case of pleas setting up separate rights of carriage-way and foot-way, it would scarcely be possible to confine the evidence so exclusively to the one issue that no part of it should apply to the other also. [*Jervis*, C. J. It must be a question of substance, to be determined by the master upon looking at the whole case.] In *Andrews v. Thornton*, 1 M. & Scott, 670, 8 Bingh. 431, it was held, that, where witnesses are called to substantiate charges contained in counts upon which the defendant obtains a verdict, it is in the discretion of the taxing-officer to allow or disallow their expenses, as he may conceive the evidence material to those counts upon which the plaintiff succeeds. In *Harrison v. Bush*, 26 Law Times, 196, which was an action for a libel in a memorial addressed to the Home Secretary complaining of the conduct of the plaintiff as a magistrate, with a plea of not guilty and a plea of justification, the jury having found that it was a bonâ fide memorial, the communication was held to be privileged, and the defendant entitled to a verdict on the issue on not guilty. On the other issue, the plaintiff succeeded. At the trial, the plaintiff called a number of witnesses to prove the falsehood of the allegations in the memorial, and to prove malice: the defendant also called a number of witnesses to prove their truth, and to shew bona fides. And, upon a motion to review the taxation, it was held that the *defendant* was entitled to the costs of his witnesses, and that the *plaintiff* was not entitled to the costs of any of *his* witnesses. Lord Campbell there says,—“The plaintiff gave evidence of malice, and shewed that the defendant, who was a medical man, would not meet him (also a medical man) in consultation, and also gave evidence that the alleged facts in the memorial were untrue, and that those facts having taken place in Frome, where the defendant resided, must have been known to be untrue by him. Now, although this

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evidence was applicable to the second plea, it was also applicable to the first plea. If so, the costs of the witnesses called by the defendant to meet the case of malice made by the plaintiff ought to be allowed on taxation." That case in no degree conflicts with the general rule. [*Cresswell*, J. The defendant is not necessarily disentitled to costs of the witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed. *Jervis*, C. J. Each party is entitled to the costs of witnesses whose testimony is *substantially* applicable to the issues upon which he succeeds.] That undoubtedly is the rule. The affidavit in answer to the rule expressly states, that, when the commission was issued, the defendant's attorney was not aware that the bill for 500*l.* ever had been in the hands of Laurier, and that he only discovered the fact upon investigating Laurier's bill-book whilst he was in Paris attending the execution of the commission; that, although questions were asked of Laurier respecting the said bill of exchange, yet such questions and answers were objected to by the plaintiff's counsel, and so much of the said evidence as related thereto was not received in evidence in this cause; and that, if it was necessary for the defendant's case to give any evidence whatever respecting the said bill for 500*l.*, the same was complete by the defendant's proving that he gave such bill to Allen, and by the production of the bill bearing the indorsement of Allen, and also his receipt thereon in his handwriting in these words,—“Received the contents, J. F. Allen;” and that the plaintiff's counsel on the trial gave up the bill in the second count solely in consequence of the evidence of Laurier given under the commission; and that no evidence whatever was given on the part of the defendant relating to the bill in the second count, which was not given as to the bill and

note in the first and third counts, except the evidence of Laurier.

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Byles, Serjt., and *Wood*, in support of the rule. The evidence given by Laurier under the commission not having been read until after the plaintiff's claim on the second count had been abandoned, it cannot be said that the defendant did not rely upon it to support the other issues. [*Jervis*, C. J. Would you have given up the second count if Laurier had not been examined?] Probably not. [*Jervis*, C. J. A defendant is not the less entitled to the costs of a witness he has in court to support an issue upon which he ultimately succeeds, because the plaintiff's counsel, seeing him there, declines to contest that part of the case.] The defendant is going to a court of error, upon the ground that Laurier's evidence under the commission was material evidence as to the other issues, inasmuch as it tended to shew that the whole of the bills were given for Allen's accommodation. [*Cresswell*, J. The master judges from what is stated in the brief, not on a casual question or an argument of counsel. *Williams*, J. The question is, what *caused* the expense to be incurred. *Jervis*, C. J. If the examination had not been read, the defendant would clearly have had the costs. *Cresswell*, J. Suppose a witness is called to prove *three* issues: he proves *one* of them; and, though examined as to the others, he says he knows nothing about them: the party calling him would lose the costs. Is not equal justice to be done the other way? Though *brought* for the purpose of proving one issue only, is the party calling him to lose his costs because he is asked a single question upon some other issue?] To use the expression of Lord Campbell in *Harrison v. Bush*, the plaintiff is conqueror in the cause, and entitled as such to all the costs of the cause, except those which are *exclusively* applicable to an issue upon which he has failed:

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Clothier v. Gann, antè, Vol. XIII, p. 220. The commission was taken out for the examination of Laurier and Sir Robert Clifton : and, though the latter was not examined, several questions were put as to the 500*l.* bill accepted by him, in order to shew how it was paid. The rule is very accurately stated in Gray on Costs, p. 81,—“The correct rule on this subject may be stated thus ; where the expense of evidence applicable to different issues, some found for one party and some for another, or to issues found distributively, is claimed by the party entitled to the general costs, he is entitled to be allowed that expense unless it be *clear* that the evidence would not have been brought if the issue on which he failed had not been on the record ; and, where the expense of such evidence is claimed by the party not entitled to the general costs, but to the costs of issues only, it ought not to be allowed unless it be *clear*, that, if the issues found against the party claiming it had not been on the record, the evidence would have been brought notwithstanding. The words ‘if it be clear’ are here used advisedly ; for, if it be left in doubt, the party who has either substantiated a real cause of action, or successfully resisted an unfounded one,—in other words, the party who becomes entitled to the general costs,—ought not to be deprived of any expense fairly incurred in establishing his case, or which there is fair reason for believing was so incurred.”

JERVIS, C. J. I am of opinion that this rule should be discharged. The principle is correctly stated by Mr. Gray. The true test is,—for what purpose was the witness called, or the commission issued ? If there had been no such issue upon the record as that raised upon the second count, for aught that appears no commission would have been issued at all. That an ingenious counsel in the course of the examination puts a question

which elicits an answer in some degree applicable to other issues, can make no difference : nor is it any objection that a witness called to prove one issue, proves also something applicable to another issue. The fact of the examination under the commission having been read after the plaintiff's counsel had abandoned the bill mentioned in the second count, amounts to nothing ; the case is the same in this respect as that of a witness called to give his evidence in court. The master must exercise his discretion as to whether the witness was or was not called substantially to prove the issue upon which the defendant succeeded. I agree entirely in the conclusion to which the master came, viz. that the commission was issued substantially for the purpose of proving the second issue, and no other.

WILLIAMS, J. I am of the same opinion. The real question is, what occasioned the expense of the witness ? The master being satisfied that Laurier's examination was substantially addressed to supporting the defendant's case upon the second issue, and there being no ground for being dissatisfied with his conclusion, the defendant was properly allowed his costs thereof.

The rest of the court concurring,

Rule discharged.

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THE BRITISH INDUSTRY LIFE ASSURANCE COMPANY, App.; ADAM WARD, Resp.

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Where a county-court judge, in stating a case for the opinion of this court under the 13 & 14 Vict. c. 61, s. 14, sets out evidence which shews a total absence of foundation for the conclusion at which he has arrived,—the court will reverse his decision.

THIS plaint was brought by the plaintiff (the respondent) as administrator of Anne Ward, his late wife, to recover the sum of 50*l.* upon a policy of assurance for 50*l.* 8*s.* effected by the said Anne Ward with the defendants (the appellants) upon the life of her, the said Anne Ward.

The said plaint came on for hearing on the 28th of March, 1855, before the judge of the county-court of Lancashire holden at St. Helen's, who on the 11th of April, 1855, gave judgment for the plaintiff for 50*l.*

It was undisputed on the trial that the defendants were and are a partnership or company for granting insurances upon lives; that their general business was transacted in London by a board of directors; that they also carried on business in the country, and, amongst other places, at St. Helen's, within the jurisdiction of the said court, by means of persons described as their agents, through and by whom all business there relating to the policies was ordinarily transacted between the assured and the board of directors.

It was not disputed that a policy upon the life of Anne Ward was duly granted by the defendants, and that it was in the words and figures following, that is to say,—

“The British Industry Life Assurance Company.

“Completely registered pursuant to the act 7 & 8 Vict. c. 110.

“Chief Office, 300, Regent Street, London.

“No. 17,787. Weekly Premium £0. 1 <i>s.</i> 0 <i>d.</i> }	£50. 3 <i>s.</i>
Sum Assured . . . }	

"Whereas, Anne Ward, of Liverpool Road, St. Helen's, Lancashire, the person hereinafter assured, hath proposed to effect an assurance with the British Industry Life Assurance Company and Family Friendly Society, upon her life, aged fifty-one years, for the whole continuance thereof, and hath duly made the declaration required by the rules of the said company: Now, this policy witnesseth, that, in consideration of the payment of the sum of one shilling this day made to the said company, the receipt whereof is hereby acknowledged, and also in consideration of the future payments of the like sum to be made at the office of the said company on each and every subsequent Monday to the date hereof, in this and every succeeding year during the life of the said assured, the funds and other property of the said company shall, and they are hereby declared to be, subject and liable, upon the death of the said assured, to pay to the widower, or any particular child or children of the said assured, if nominated to receive the same by the said assured, or, in default of nomination, then to the executors, administrators, or assigns of the said assured, the sum of 50*l.* 3*s.* lawful money of Great Britain: And it is hereby declared that the said assurance is effected under and in pursuance of the deed of settlement of the said company; and the same is and shall be subject and liable to the several conditions, restrictions, and stipulations therein contained, so far as the same may be applicable thereto, and to the conditions hereupon indorsed. In witness whereof, the common seal of the said company having been hereunto affixed, we, three of the directors of the said company, have hereunto set our hands this 14th of February, 1853."

There were certain conditions indorsed upon the policy, but they were not material to this action.

It was undisputed that Anne Ward named in the

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policy died on the 11th of November, 1854; that the funds of the company were and are sufficient for payment of the sum assured, if legally payable; that Anne Ward made no nomination as mentioned in the policy; that the plaintiff was her husband, and is her administrator; and that he is entitled to recover what, if anything, is legally recoverable on such policy.

But the defendants contended that the liability on the policy was determined by default in payment of the weekly premium or sum of 1s. for eleven successive weeks previous to the 25th of October, 1854. To this it was answered, that such default had been effectually waived by the defendants.

As to such default, and as to the waiver of such default, the facts were as follows:—

It was undisputed at the trial, that, at the time of the policy being effected, the plaintiff and his wife, the assured, resided at St. Helen's, and continued so to reside until her death; that, at the time of the policy being effected, and for some time afterwards, Thomas Gerrard was the defendants' agent for St. Helen's; that it was within the scope of his duty as such agent to receive applications for policies, to deliver out such policies to the assured when signed by the directors, to receive the premiums thereon, and to acknowledge the receipt of such premiums; and that the policy in question was applied for to him, and delivered out by him, as such agent.

It was undisputed, that, at the time of the delivery of such policy, Thomas Gerrard also gave to the plaintiff, then acting as agent for his wife, the assured, a card, on one side of which was a form for entering the receipt of the weekly premiums, and which the assured was to keep as a memorandum of or voucher for the payment of such premiums; and on the other side were the following printed notices:—

"Notice to Members.

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"1. Members must pay their subscriptions regularly each week, or otherwise fortnightly or monthly.

"2. Any member allowing his or her payments to fall more than four weeks in arrear, will be excluded from all benefit.

"3. In case of removal or death, notice must be immediately given to the agent.

"4. All sound and healthy persons of sober habits, between the ages of ten and sixty years, may become members of this company, on application to the agent, Mr. Thomas Gerrard, Liverpool Road, St. Helens."

It was undisputed, that the person whose name was so affixed to the said notice was the said Thomas Gerrard, the then agent for the defendants as aforesaid. It was proved, and not disputed, that the card and the notices thereon, whereby the extremely inconvenient conditions in the policy were in part modified and relaxed, was so delivered out by the said Thomas Gerrard under the sanction and by the authority of the defendants or their directors. And it was proved, that, when Thomas Gerrard so gave out such card and notices, he stated to the plaintiff, the agent for the assured, that it would be sufficient if the premiums were paid when he called upon the assured for payment of such premiums.

It was proved, and undisputed, that Thomas Gerrard had then instructions from the defendants, that all policies which were four weeks in arrear should be returned by him to the directors as lapsed. But it was not proved or contended that such instructions were ever communicated to Anne Ward, or to the plaintiff during her life-time.

It was proved, and undisputed, that, after the effecting of the said policy, Thomas Gerrard removed from St. Helen's, and that William Gerrard succeeded him as agent, with similar duties, and under similar instruc-

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tions from the defendants; and that he continued in his office as such agent until after the death of Anne Ward, the assured. But it was not proved that he ever countermanded or withdrew the representation made by Thomas Gerrard, that it would be sufficient if the premiums were paid when he called for them.

It was undisputed, that the premiums were paid regularly, or at least when and as the successive agents called for them, up to the period of eleven weeks before the 27th of October, 1854. It was proved, that, on that day, the premiums were in arrear eleven weeks. But it was not proved, or contended, that the assured, or her agent, had during those weeks received any notice or intimation from the defendants or their agent, that the policy was forfeited, or that the assured would be excluded from all benefit thereof.

It was proved, that, on the said 27th of October, the plaintiff called (about other business) upon William Gerrard, the then agent for the defendants; that William Gerrard then reminded the plaintiff that the premiums on the policy were eleven weeks in arrear, and requested to know whether it was intended that the policy should be kept on foot; that the plaintiff stated, in answer to such question, that it was so intended, and then offered to pay such arrears to the said William Gerrard; that the said William Gerrard then stated that it would be sufficient if they were paid when he called for them the next week; and that, on Tuesday, the 2nd of November, the said William Gerrard did call upon the plaintiff, and received from the plaintiff, as agent for the assured, the sum of 11s., the premium for such eleven weeks; that the said William Gerrard received such arrears without protest or objection, and inserted the usual statement of such payment on such card as kept by the assured, or her agent, as before mentioned.

It was proved that the said William Gerrard, the

agent, did not, according to his instructions, return the policy as lapsed, either at the end of four weeks after the first default, or at any time during the life of the assured. And it was proved, that, after the death of Anne Ward, the said William Gerrard, the agent, reported her death to the directors in London, and at the same time remitted the premiums so received.

The directors thereupon repudiated the agent's authority to receive the said arrears of premium, and insisted that the policy was forfeited. The re-payment of such arrears was by their direction tendered to the plaintiff, but was rejected.

It was objected that no evidence had been given of any authority from the defendants to their agents to accept the arrears of premium as aforesaid.

But the judge considered that such evidence had been given. And he determined in law, as he stated he should have directed a jury, that, assuming that a forfeiture of the policy had been committed by allowing the payments of the weekly premiums to be in arrear contrary to the conditions in the policy of insurance, such forfeiture would be waived or condoned by the receipt, with full notice of the default, of such arrears by the defendants or their agent, if such agent was duly authorized in that behalf. And, though no express authority for the purpose had been proved, he considered, that, under the circumstances before stated, it had been proved, and he found, that William Gerrard, the defendants' agent, was duly authorized to receive the said arrears of premiums from the assured, or her agent, on her behalf, and so to waive or condone the imputed forfeiture. And he found that the said William Gerrard had, as such agent, received such arrears by virtue of that authority, and with full knowledge of the default. And he held that the policy was a valid policy at the death of the assured, and

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that the defendants were liable upon the policy; and he directed a verdict to be entered for the sum of 50*l*.

The case, as originally stated by the judge of the county-court, did not set out the evidence which was given before him, nor did it state whether the decision proceeded upon the facts or the law, and therefore, on its coming on for argument in Michaelmas Term last, the court sent it back to be amended in this respect. Upon its being called on again, in the present term, it appeared that the intention of the court had not been sufficiently conveyed to the learned judge, and accordingly the case was again sent to him to be re-stated. The judge returned it with the evidence and his ruling thereon as set out above.

Tapping, for the appellants. The only question here, is, whether Gerrard, the agent of the company, had authority to waive the forfeiture. The county-court judge finds as a fact that there was no *express* authority; but he finds, as a conclusion of law, that there was an implied authority. The facts, however, which he has set out shew no evidence whatever of an authority, either express or implied, to waive the forfeiture. There is nothing to justify the conclusion the judge came to. [*Cresswell*, J. The evidence set out is not evidence tending to prove that issue. The judge decides that it is. That is a decision in point of law. The question in substance is, whether there was any evidence to go to a jury. (a) This is like an exception to the ruling of a judge at nisi prius.] This is somewhat like the case of *Acey v. Fernie*, 7 M. & W. 151. There, upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid

(a) See *Smith*, App., *Douglas*, Resp., antè, Vol. XVI, p. 31.

until the 12th of April, when the country agent of the assurance company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due: that, if not paid within that time, he was to give immediate notice to the office of that fact; and that, in the event of his omitting to do so, his account would be debited for the amount after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days: it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount. It was held,—first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured,—secondly, that, as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books debiting him with the amount, were no evidence of a new agreement between the company and the assured. That case was cited in *Wing v. Harvey*, 5 De G., M'N., & G. 265.

Keating (with whom was *Milward*), contra. If there was *any* evidence which a judge would be justified in leaving to a jury, that Gerrard the agent had authority, either express or implied, to waive the forfeiture of the policy in question, that would justify the county-court judge in determining this case in the way he has done. [*Cresswell*, J. If express evidence is required, there really is none. *Crowder*, J. The only question is, whether such authority can be implied from the evidence set out.] It was entirely a question of fact whether

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the agent had such authority or not. [Crossed] J. F. The affirmative of a fact cannot, I apprehend, with propriety be found without *some* evidence. Can you find on the statement of the case *any* evidence of authority? There certainly is none.

JARVIS, C. J. The judgment must be reversed. I understand the case now to set out every thing on which the judge of the county-court could have found that the agent had any authority to waive the forfeiture. The judge states that he found that the agent had such authority. I can see no evidence of it. My Brother Wills suggests to me that that is a misconception, and that the true question is, not whether the agent had a right to waive the forfeiture, but whether he had authority to make a new contract. I think he had not. There must, therefore, be judgment of nonsuit.

The rest of the court concurring,

Judgment accordingly.

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STORIE, Clerk, v. CHARLES RICHARD, BISHOP OF
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THIS was a quare impedit, in which the court in Hilary Term, 1850, gave judgment for the plaintiff: vide ante Vol. IX, p. 62. The written judgment, which was prepared by the then Chief Justice Wilde, was at the time mislaid, but has since been found amongst the papers of the late Lord Truro.

WILDE, C. J. This is a case of quare impedit, in which the plaintiff complains of a disturbance in his right of presentation to the church of St. Mary Magdalen, Peckham, and he states in his declaration that he was seised of the advowson of the church of St Giles, Camberwell, and that, under the authority of the statutes made in that behalf, a church afterwards called the church of St. Mary Magdalen had been built, and that an ecclesiastical district had been divided from the said parish of St. Giles, and assigned and appropriated to the said church of St. Mary Magdalen as a district parish church for all ecclesiastical purposes, and had become in law a distinct benefice presentative, and that the plaintiff remaining seised of the advowson of the vicarage of St. Giles, became seised as a fee of the perpetual right of presentation to the incumbency of the parish of St. Mary Magdalen: that afterwards the parish church of St. Giles became vacant by the resignation of the plaintiff, and thereupon the said plaintiff presented himself to the said church, and was thereupon duly admitted, &c.; and that, whilst the plaintiff was seised of the right of presentation to St. Mary Magdalen, the Rev. J. S. Darwell, clerk, who had been

In quare impedit, the ordinary cannot counterplead the patron's title to present, by setting up title in a third person; and he does so as much by setting up a right in the Queen to present by lapse, as by any other title.

Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 G. 3, c. 45, and 59 G. 3, c. 184,—the annual value of the two livings exceeding 1000*l.*—the parish church becomes, under the provision of the 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void.

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appointed by the plaintiff and had been duly licensed to be stipendiary curate to serve the said district church, duly resigned the said stipendiary curacy; and that thereupon, the plaintiff remaining seised of the right of presentation to the said district church which had so become vacant, it then belonged to the plaintiff to present a clerk, but the bishop unjustly hindered him, &c.

To this declaration there were several pleas, but three only are before the court.

The second plea upon the record,—after stating the division of the parish of St. Giles, and the assignment of the district parish of St. Mary Magdalen, and that the church of St. Giles became vacant by the resignation of the plaintiff, who was afterwards admitted, &c., upon his own presentation, to the church of St. Giles,—states, that the church of St. Mary Magdalen, which the plaintiff up to the time of his resignation held together with the church of St. Giles as one church, and which church of St. Mary Magdalen, being a benefice with cure of souls, by reason of the premises, became vacant, and it belonged to the plaintiff to present; that the said church of St. Mary Magdalen remained vacant more than eighteen months, neither the plaintiff nor the ordinary nor the metropolitan, nor any other person having presented, by reason whereof the right devolved to the crown to present a clerk; that no clerk had yet been presented; that, after a period of eighteen months had elapsed, and not before, the plaintiff, who at the time the church became vacant had been seised of the advowson, nominated a clerk to the said church, whereupon the bishop refused to admit, &c., for the cause aforesaid,—concluding with a verification.

The third plea states that the plaintiff ought not to present, because the church of St. Mary Magdalen was a benefice with cure of souls, and that the resignation of the plaintiff of the church of St. Giles was accepted

by the bishop, and notice of such acceptance given, more than eighteen months before the plaintiff's presentation, or any disturbance by the bishop.

The fourth plea states, that the church of St. Mary Magdalen is a benefice with cure of souls, and that the presentation, &c., of the plaintiff to the church of St. Giles was after the passing of the statute 1 & 2 Vict. c. 107, intituled "An act to abridge the holding of benefices in plurality," and more than eighteen months before the presentation to St. Mary Magdalen, or any disturbance, &c., in the said church of St. Giles, being a benefice with cure of souls; and that the value of the two churches jointly exceeded the annual sum of 1000*l*.

To these three pleas the plaintiff has demurred specially, assigning, among other causes, that the church of St. Mary Magdalen being yet vacant, it is not competent to the defendant, the bishop, to counterplead the title of the plaintiff, as he has attempted to do by these pleas.

On the part of the plaintiff, the authorities relied upon were the cases of *Elvis v. The Archbishop of York and Others*, reported in Hobart, 315, and also in Sir William Jones, p. 4 (a); and also the case of *Apperley v. The Bishop of Hereford*, 3 Moore & Scott, 102, 9 Bingh. 681: and these cases appear to the court to be decisive authorities in support of the objection.

In the first case, of *Elvis v. The Archbishop of York and Others*, the declaration alleged that Sir Gervas Elvis, Knight, was seised of the manor of Sanby, with the advowson of the church of Bedworth appendant, in fee, and held the same of the king, and, being so seised, presented George Turpin, his clerk, who was admitted, &c.; that the said Sir Gervas was attainted of felony, and executed, by force whereof the king became seised of the

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manor ad quod, &c., and granted the same manor and advowson to the plaintiff, who became seised in fee ; that the church became void by the death of Turpin, whereby it belonged to the plaintiff to present, and the defendant disturbed him, &c. The archbishop, as metropolitan, pleaded, confessing the seisin of Sir Gervas Elvis, and the presentation of Turpin, and the attainder of Sir Gervas ; but alleged further, that, by virtue of the attainder, the king became seised of the manor ad quod, and so seised, the church became void by the death of Turpin, whereby the king to the church, being void, did present to the archbishop the said Thomas Bishop, whom he caused to be admitted, &c. ; without this, that the king did grant to the plaintiff the advowson, &c., as alleged, prout, &c. : whereupon the plaintiff demurred in law, generally.

It is unnecessary to notice the proceedings upon the pleas by the other defendants, as the questions which arose upon them have no application to the present case. It will be observed that the title set up by this plea, was, a title in the crown. A very learned and elaborate judgment was pronounced by Lord Hobart upon the precise question whether it was competent to the ordinary or metropolitan to counterplead to the title of a plaintiff. The right so to do being considered first as it stood upon the common law, and secondly with reference to the statute of 25 Edw. 3, st. 3, c.7 : and the unanimous opinion of the court upon that point, was, that the plea was bad, and that, at common law, neither ordinary, as ordinary, either before collation or after, nor the incumbent either of his collation nor of the presentation of any other, could plead to the title of the patronage, because neither of them had an interest in the patronage, and therefore could not dispute that with which they had nothing to do ; that the collation by lapse was nothing but institution and induction in respect of his office as ordinary ; and that the law would not let in a

thing so absurd as to admit two to dispute the interest of a third : and the reason and grounds of this law are stated at large : and, as nothing was objected to them upon the argument of this case, it is sufficient to refer to them without repeating them. And it was also held to be clear that the statute of 25 Edw. 3, stat. 3, c. 7, gave no right to plead otherwise than the ordinary could plead at common law, as he acquired no interest for himself, nor his clerk, in the church.

The case of *Apperley v. The Bishop of Hereford* gave rise to precisely the same question : the title set up did not refer to the crown. The court held that the case of *Elvis v. The Archbishop of York* was decisive of the question, and that the law was clearly laid down, that, before the statute of 25 Edw. 3, stat. 3, c. 7, the bishop could not in any case dispute the title of the patron to present ; and that, as in the case then at bar, no collation had been made, that statute did not help the defendant.

Upon the part of the defendant, it was stated generally in answer to the objection before stated, that true it was that the ordinary could not plead lapse to himself, but that he could plead lapse to the crown ; and the case in *Hobart* was attempted to be distinguished, upon the ground that, in that case, the plaintiff's title was traversed, but that, in the present case, the title was admitted, but a right in the crown to present by lapse only was pleaded. No authority was referred to in support of this distinction ; and the court is of opinion that it is not founded upon any principle, and that the law is clear and settled, that the ordinary cannot controvert the title of the plaintiff to present ; and that he does so as much by setting up a right to present by lapse as by any other title. The objection, therefore, to the pleas appears to be well founded, upon principle and authority.

It was also objected that the third plea was bad, upon another ground. That plea is founded upon the 1 & 2

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Vict., c. 106, s. 4, by which it is enacted "that, except as thereafter provided, no spiritual person holding a benefice with a population of more than 3000 persons, shall accept and take to hold therewith any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than 500 persons, nor shall any spiritual person holding a benefice with a population of more than 500 persons, accept and take to hold therewith any other benefice having at the time of his admission, institution, or being licensed thereto, a population of more than 3000 persons; nor shall any spiritual person hold together any two benefices, if, at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of 1000*l.*;" and the plea alleges that the churches of St. Giles and St. Mary Magdalen did jointly exceed the value of 1000*l.*; and it was insisted on the part of the defendant, that the plaintiff was disqualified to be instituted to the church of St. Mary Magdalen while holding the living of St. Giles. To this it was answered, that, by the institution and induction to the living of St. Mary Magdalen, the church of St. Giles would become ipso facto void; and that the acceptance of an office which could not be holden with some other office already possessed, vacated the first office; and the before-mentioned case of *Apperley v. The Bishop of Hereford* was cited as a distinct authority applicable to the present case. The plaintiff in that case was owner of the advowson of Stoke Lacey, and also became incumbent, upon his own presentation; and the declaration averred that the defendant, being incumbent of Stoke Lacey, was admitted, instituted, and inducted into the vicarage of Ocle Pritchard, the two churches being respectively benefices with cure of souls, whereby it belonged to him to present to Stoke Lacey; that he accordingly presented Beetham, his clerk, to be admitted,

&c. ; but that the bishop would not admit, but unjustly hindered, &c.

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It was argued, on the part of the defendant, that the plaintiff, by the institution and induction into Ocle Pritchard, had not made Stoke Lacey void, but only voidable ; and that the patron might make it void or not, at the election of the patron : and it appeared by the plea, that, after the institution and induction to Ocle Pritchard, the plaintiff had conveyed the advowson of Stoke Lacey to another person. But the court held, that, by the institution and induction of the plaintiff to the church of Ocle Pritchard, the church of Stoke Lacey had become void, and the plaintiff's title to present to Stoke Lacey had accrued.

This is a decisive authority in support of the plaintiff's answer to the objection of the defendant, and the last plea, therefore, is bad upon both grounds, and there must be judgment for the plaintiff on these demurrers.

Judgment for the plaintiff.

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Where a vendor fails to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor) is not entitled to damages for the loss of his bargain.

A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, and C. refusing to confirm it, B. brought an action against A. for the breach of contract:—Held, that he was only entitled to recover nominal damages and the expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavours to substitute a new contract on the failure of the original bargain.

POUNSETT v. FULLER.

THIS was an action brought to recover damages for the breach of a contract for the sale by the defendant to the plaintiff of the right of shooting over a manor, to which the defendant failed to make a legal title.

The defendant paid 7*l.* into court, to cover the expenses of investigating the title, and nominal damages for the breach of contract. The plaintiff claimed substantial damages, and also the expenses of abortive attempts to substitute a new agreement after the original contract had been found incapable of being carried into effect.

The cause was tried before Crowder, J., at the sittings in London after last term. The facts were as follows:—The plaintiff having advertised in "The Times" for the purchase of a right of shooting within a convenient distance of London, the defendant wrote to him telling him he had some shooting to dispose of, and, after some negotiations between them, the plaintiff went down to Sussex to view the manor, and, on the 31st of March, 1855, the following agreement was signed by the defendant, a similar one being executed by the plaintiff,—
"I hereby agree to sell to Mr. Pounsett the remainder of my term in Strood Manor, in the county of Sussex (four years unexpired), for the sum of 200*l.*, he taking the furniture and fixtures in the cottage at a valuation."

On the 3rd of April, the parties met, with their respective attorneys, when the defendant's attorney produced an assignment. Upon investigation, however, it turned out that the defendant had no legal title to the shooting, but a mere agreement from Mr. Commcrell, the owner of the manor, to let the shooting to him for

four years at the yearly rent of 8*l.* 10*s.*, he supplying Mr. Commerell's house with game.

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The plaintiff being still anxious to obtain the shooting, the negotiation went on, and the parties again met on the 5th of April, when three proposals were made,—first, that the plaintiff should take the assignment as proposed, but at a reduced price,—secondly, that there should be a direct letting of the shooting from Commerell to the plaintiff, the defendant representing that Commerell would not object. A deed was prepared accordingly. Commerell, however, did object. The third proposal was, that the defendant should grant the plaintiff an underlease, with a covenant for quiet enjoyment, trusting to Mr. Commerell's position as a gentleman, that he would not disturb the arrangement. The defendant was willing to do this; but the plaintiff ultimately declined it, and the bargain was broken off.

On the part of the plaintiff, it was insisted that he was entitled to recover damages for the loss of his bargain; and it was proposed to give evidence of the expense and inconvenience he had been put to in purchasing a less commodious right of shooting in another county. This the learned judge rejected. It was then insisted that the plaintiff was entitled to the expenses of his journey to Sussex to view the manor, and the expense of the deed prepared under the arrangement of the 5th of April.

The learned judge ruled that the plaintiff was entitled to recover nothing beyond the expenses of investigating the title down to the time when the contract was broken, viz. the 5th of April, and nominal damages for the breach,—which it was admitted were covered by the 7*l.* paid into court; and that he was not entitled to recover anything in respect of the expenses of the deed and the subsequent negotiations, which were not incurred in

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furtherance of the original contract, but in an abortive attempt to make a new contract.

The jury accordingly returned a verdict for the defendant.

Bovill, on a former day in this term, obtained a rule nisi for a new trial, "on the ground of the improper rejection of evidence as to the shooting having been of greater value than the sum mentioned in the contract; or on the ground of the misdirection of the judge presiding at the trial, in directing the jury,—first, that the plaintiff was not entitled to recover for any loss or damage for any increased value of the shooting,—secondly, that the plaintiff was not entitled to any of the expenses of the deed which was prepared, and executed by the plaintiff,—thirdly, that the plaintiff was not entitled to any of the legal expenses incurred after the 5th of April," He referred to *Flureau v. Thornhill*, 2 Sir W. Bl. 1078, *Hopkins v. Grazebrook*, 6 B. & C. 31, 9 D. & R. 22, and *Robinson v. Harman*, 1 Exch. 850.

Shee, Serjt., and *Hance*, now shewed cause. The general rule is clear and indisputable, that, where a man agrees to sell an estate, he sells subject only to his ability to make a good legal title; and, if it turns out that he has, without any fraud on his part, a defective title, or no title at all, the purchaser will be entitled to nominal damages only beyond the expenses necessarily incurred in the investigation of title. The cases upon the subject are uniform. In *Flureau v. Thornhill*, 2 Sir W. Bl. 1078, De Grey, C. J., says: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And Blackstone, J., added:

“These contracts are merely upon condition, frequently expressed, but always implied, that the vendee has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected.”

The next case which came before the court was that of *Hopkins v. Grazebrook*, 6 B. & C. 31, 9 D. & R. 22, where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him,—it was held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. Abbott, C. J., said,—“Upon the present occasion I will only say, that, if it is advanced as a general proposition, that, where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration. But the circumstances of this case shew that it differs very materially from that which has been quoted from Sir. W. Blackstone’s reports. There, the vendor was the owner of the estate, and, an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest: here, no such offer was or could be made. The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title; and, having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage

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sustained by a breach of his contract." And Bayley, J., said : "The case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title. Now, where a vendor holds an estate as his own, the purchaser may presume that he has had a satisfactory title ; and, if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." The point again came under the consideration of the court of King's Bench in the case of *Walker v. Moore*, 10 B. & C. 416. There, A. having contracted with B. for the purchase of a real estate, the vendor, acting bonâ fide, delivered an abstract, shewing a good title ; and A., before he examined it with the original deeds, contracted to re-sell several portions of the property at a considerable profit : upon a subsequent examination of the abstract with the deeds, A. discovered that the title was defective, and thereupon the sub-purchasers refused to complete their purchases, and he refused to complete his purchase from B., and brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title, *the profit that would have accrued from the re-sale of the property, the expense attending the re-sale, and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title* : and it was held, that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. Bayley, J., there said : "The case of *Hopkins v. Grazebrook* is very different from this. There, the defendant had sold property as his own which was not so, and the court was of opinion that the defendant, being in fault by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal dam-

ages; and there the principle on which the jury assessed the damages is not stated. Here, the defendants undertook to make a good title, and they might honestly think that they should be able to do so. It turned out that they could not, and consequently the contract was broken, and they were liable to an action. The plaintiff, however, must shew that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste. If the abstract had been examined with the deeds, and found correct, the plaintiff might perhaps have been justified in acting on the faith of having the estate; and if after that time he had made a sub-contract, I think he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor. And, further, if there were mala fides in the original vendor (but not otherwise), I am not prepared to say that the purchaser might not recover the profit which would have arisen from the re-sale." And Parke, J., said: "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau v. Thornhill*, which was recognised in *Johnson v. Johnson*, 3 B. & P. 167, *Bratt v. Ellis*, Sugd. V. & P. App. 7, and *Jones v. Dyke*, Sugd. V. & P. App. 8. In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." The question then came before the court of Exchequer in *Robinson v. Harman*, 1 Exch. 850, where it was held, that, where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the

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loss of his bargain. Parke, B., there says: "The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held, that, contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if he fail to make a good title, the only damages recoverable, are, the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook*." And Alderson, B., added: "The damages have been assessed according to the general rule of law, that, where a person makes a contract and breaks it, he must pay the whole damage sustained. Upon that general rule an exception was engrafted by the case of *Flureau v. Thornhill*, and upon that exception the case of *Hopkins v. Grazebrook* engrafted another exception. This case comes within the latter, by which the old common-law rule has been restored. Therefore the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted." The recent case is not within the exception: there was no fraud on the part of the defendant; he bonâ fide believed he had that which he professed to sell. Sir E. Sugden, in his *Law of Vendors and Purchasers*, 11th edit., p. 424, lays down the rule very much in the terms in which it has been stated in the above cases. He says,—“If the purchaser succeed in proving the title bad, he will, according to the counts upon which he recovers, obtain a verdict either for his deposit or for

damages, which in most cases would be regulated by the amount of the deposit. If he declare on the common money counts, he of course cannot obtain damages for the loss of his bargain; and, even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of the bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title." And, after referring to *Hopkins v. Grazebrook*, he adds,—“This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood,” [*Williams, J.* I must confess I cannot understand the exception introduced by the case of *Hopkins v. Grazebrook*.] *Hopkins v. Grazebrook* and *Robinson v. Harman* proceed on the ground that the vendor contracted to sell, in the one case what he knew he had not, and in the other with an express covenant that he had a title which he had not in point of fact. [*Jervis, C. J.* That is pretty much the same thing.] Here, the defendant could not be expected to know that the grant he had from Mr. Commerell was not a perfectly good and valid one. The case, therefore, differs widely from those two. No real pecuniary damage can result to the plaintiff from the fact of the title proving defective, beyond the costs of investigating the title. In *Hodges v. The Earl of Litchfield*, 1 N. C. 492, 1 Scott, 443, it was held, that, where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages expenses incurred previously to entering into the contract, nor the expense of a survey of the estate, nor the expense of a conveyance drawn in anticipation of a completion of the purchase, nor the extra costs of a chancery suit touching the purchase, in which the vendor is

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defeated, nor losses sustained by the purchaser in the re-sale of stock prepared for the estate: but that he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money. In *Worthington v. Warrington*, antè, Vol. VIII, p. 134, A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his own expense, such alterations and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises, at any time during the two years, for 600*l.*,—"it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought assumpsit to recover damages for the breach of contract, and also compensation for the money expended by him in improvements: and it was held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. Coltman, J., says: "Every one who purchases land knows that difficulties may exist as to the making a title, which were not anticipated at the time of entering into the contract." [*Jervis*, C. J. The distinction suggested by the cases, in truth, will not stand the test of examination. The only point argued in *Worthington v. Warrington*, was, whether the purchaser was entitled to the value of the improvements.] The same rule was laid down in *Tyrer v. King*, 2 Car. & K. 149. The rule, subject to the exceptions already referred to, has also found favour with the American courts. Thus, in *Baldwin v. Mann*, 2 Wend. 399, where "the covenantor had acted in good faith, and refused to convey because his title had in part failed, the plaintiff

insisted that he was entitled to recover the increased value of the land on the day when the deed was due, beyond the contract price,—it was held, that, where the vendor acted *in bad faith*, the plaintiff would be entitled to recover, by way of damages, the difference between the contract price and the enhanced value when the conveyance should have been made; but that, in a case of *good faith*, the contract price would be considered conclusive, and the plaintiff, having paid nothing, could recover nothing.” Mr. Sedgwick, observing upon this case, says (a),—“In this decision the court proceeded on the analogy of eviction, where the plaintiff is limited to the consideration paid, and disregarded the authorities in regard to chattels, where it is well settled that the plaintiff is entitled to recover the enhanced value, without being driven to any investigation into the good or bad faith of the vendor. (b) And to this the courts of New York have adhered. So, in a recent case,—*Peters v. M’Keon*, 4 Denio, 546 (c),—the defendant, in consequence of a defect in his title, failed to comply with his contract to convey certain property; the plaintiff, who was to pay on the delivery of the deed, had advanced nothing, but he had removed to the property and done some work on it; and in the declaration he claimed to recover his expenses of removing, and also his labour.

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(a) Sedgwick on Damages, 2nd edit. p. 185.

(b) The language of the court was as follows:—“If the vendor acts in bad faith, and refuses to convey because the property has increased in value, and with a view of putting the enhanced value in his own pocket, it becomes a case of fraud, and the plaintiff would

clearly be entitled either to compel a specific performance in equity, or to recover by way of damages the difference between the contract price and the enhanced value when the conveyance should have been made.”

(c) And see the authorities collected in *Fletcher v. Butten*, 6 Barb. S. C. R. 646.

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No bad faith was alleged or pretended. The judge who tried the cause told the jury, that, if the defendant *wilfully* and *designedly* neglected to convey, the plaintiff was entitled to recover *all the damages* which he had sustained by the breach of his contract; but that, unless the non-performance was wilful and intentional, the plaintiff was entitled to *nominal damages* only; that, if the omission to convey was accidental or inadvertent, and the defendant had fairly tendered him all the title he could make, the plaintiff could not recover any of the special damages. A verdict was found for nominal damages, and, on exceptions, this was held right; the court saying,—‘that, on an executory contract for the sale of lands which the vendor believes to be his own, and where there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same as it is in the case of an executed sale,’ or on the covenants for seisin and for quiet enjoyment. But the supreme court of the United States have disregarded the analogies deducible from the actions on real covenants, and have resorted to those to be derived from executory contracts for the sale of chattels. In a case somewhat similar to the last,—*Hopkins v. Lee*, 6 Wheaton, 109, 118,—the following language was held by that high tribunal:—‘The rule is settled in this court, that, in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is, its price at the time of its breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the

contract be for real or personal property, if the lands, as is the case here, have not been improved or built on. (a) In both cases, the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference. This is not an action for eviction.' (b) In Virginia, in general, upon the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money actually paid, and interest thereon: *Thompson's Executors v. Guthrie's Administrator*, 9 Leigh, 111. But this rule will not be applied when the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall after his contract disable himself from performing it by conveying the land to another, he will be held liable for the value at the time of the breach, and interest may be allowed on such value for that time: *Wilson v. Spencer*, 11 Leigh, 261. In Kentucky, it is held by the court of appeals, that, on a covenant to convey, where the vendor is *without fraud* incapable of making a title, the rule of damages is, the purchase-money, with interest from the time it was paid; and the court approved the English case of *Flureau v. Thornhill*: see *Allen v. Anderson*, 2 Bibb, 415. But, in the same state, in a case where the vendor *fraudulently* sold land to which he *knew* he had neither a good title nor claim, it was held by the court of appeal in equity, that the value of the land should be fixed at what it was worth at the time of

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(a) See *Worthington v. Worthington*, antè, Vol. VIII, p. 134.

(b) In *Baldwin v. Munn*, 2 Wend. 399, 407, speaking of this case, Sutherland, J., says, "It will be perceived that this was substantially a case of ex-

change of lands. Very different considerations may be applicable to such a case from the ordinary case of a mere failure to convey, where the consideration money has not been paid."

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impannelling the jury : *M'Connell v. Dunlop*, Hardin, 41. (a) And, again, in the same state, in an action on a covenant to convey land, the jury were told, that, if they found for the plaintiff, they must give the value of the land at the time it should have been conveyed, and interest. But, on review, this was held erroneous, and the court of appeals said,—‘ When there is a fraudulent refusal to convey, less damages than the value of the land at the time the conveyance ought to have been made should never be given, and the jury would no doubt be at liberty to find damages equivalent to the value, and interest down to the assessment. But, in such a case, the giving or withholding interest is a matter in the discretion of the jury, and, consequently, instead of instructing the jury as a matter of law to give interest, the court should have left them to exercise their discretion, free from any intimation of opinion.’ *Handley v. Chambers*, 1 Littell’s Rep. 358. In these cases, it will be noticed, that the courts have recognised a difference in the rule of damages, growing out of the motives of the party in default. *This distinction has crept in from the civil law, without, as I believe, sufficient consideration being given to the point.* There may be room for the suggestion, in equity, on a bill filed for performance, or for general relief. But, when I come to consider the rule of damages on contracts generally, I think I shall be able to prove, that, at law, the motive of the party can never be taken into consideration in an action of contract; that the intent cannot be averred in pleading, except as matter of form, nor evidence given in regard to it; and that, consequently, the damages cannot be made to depend upon it.” Notwithstanding the evident disapproval by that very learned author of the rule now contended for, it is submitted that it is too

(a) And see *Patrick v. Marshall*, 2 Bibb, 40; *Fisher’s Heirs v. Kay*, 2 Bibb, 434.

firmly established by the authorities to be disregarded by the court. (a)

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Bovill and *Raymond*, in support of the rule. For the breach of this contract, it is submitted, the plaintiff is entitled to recover substantial damages for the loss of his bargain, and any increased value of the shooting. The case on the part of the defendant rests wholly upon *Flureau v. Thornhill*, 2 Sir W. Bl. 1078, the nisi prius decision in *Tyrer v. King*, 2 Car. & K. 149, and the two very unsatisfactory notes in Sugden's Appendix, of *Bratt v. Ellis* and *Jones v. Dyke*. [*Williams, J. And Walker v. Moore*, 10 B. & C. 416.] *Walker v. Moore*, it is submitted, is in the plaintiff's favour. The case of *Flureau v. Thornhill*, for the first time laid it down, that, upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to damages for the loss of his bargain,—a principle which certainly is

(a) Again treating this subject, Mr. Sedgwick, at p. 208, says that the clear and irresistible result of the authority, is, "that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement." He adds,—"To this general rule, however, there undoubtedly exists an important exception, which has been introduced from the civil law, in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title. In these cases, the line has been repeatedly

drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter, he is entitled to damages resulting from the loss of his bargain,—referring to *Flureau v. Thornhill*, *Hopkins v. Grazebrook*, *Robinson v. Harman*, and *Bitner v. Brough*, 11 Penn. R. 127. This exception cannot, I think, be justified or explained on principle; but it is well settled in practice."

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actions against the charterers for the short delivery : the plaintiffs, having no defence, suffered judgment by default in those actions, and attended the execution of a writ of inquiry : the defendant (the owner of the vessel) had notice of the actions, and of each step therein, and was invited to take upon himself the defence, which he declined to do : and it was held, that the plaintiffs were entitled to recover the sums paid by them in those actions, and also the costs incurred by them therein,—Tindal, C. J., saying : “ The only question now before us, is, whether there was any evidence to go to the jury that these costs were incurred by the authority or assent of the defendant. He received notice of each step in the actions, and was urged to stand in the plaintiffs’ shoes : but, though he refused to take upon himself the defence, he did not discountenance it, or prohibit the plaintiffs from defending. Under the circumstances, very little evidence of assent would operate upon the minds of the jury.” Here, the parties were *bonâ fide* endeavouring down to the last moment to carry out the original contract ; and there was ample evidence to warrant a jury in coming to the conclusion that the expense of the deed of the 5th of April, and of the subsequent negotiations, was incurred with the assent of the defendant. At the time that deed was prepared, and executed by the plaintiff, both parties were evidently ignorant that Mr. Commerell was actively hostile to the proposed arrangement.

JERVIS, C. J. I am of opinion that my Brother Crowder was right in the view he took at the trial, and consequently that this rule should be discharged. Two points have been made on the argument. In the first place, it is said that my Brother Crowder was wrong in ruling that the plaintiff was not entitled to recover in respect of the fancied value of the shooting. Now, I

agree that that is a very complicated and difficult point; and, if it were necessary to propound any precise and definite rule upon it, I should desire time for consideration. But I think we must be governed by the decided cases, which, though they do not lay down any very intelligible principle, are not very difficult to understand. The case of *Flureau v. Thornhill*, 2 Sir W. Bl. 1078,—which has always been recognised as an exception to the general rule of law,—held, that, where a man undertakes to sell an estate, the bargain is to be understood as being subject to this qualification or condition, viz. that he has a good title to convey: and in the judgment it is said that it results from that, that the vendee, where the bargain goes off by reason of the vendor's inability to perform the condition, gets no damages beyond the mere expenses of investigating a title which turns out to be bad. I do not stop to inquire whether the rule is well expressed in that case. All the cases, however, have proceeded upon and adopted that general rule. *Walker v. Moore*, 10 B. & C. 416, expressly determines, that, where the party is not to blame, but professes to sell that which he bonâ fide believes he can sell, though in fact he has no title, he is liable only for the expenses of investigating the defective title. Where the party is professing to sell that which he *knows* he cannot sell,—as in *Hopkins v. Grazebrook*, 6 B. & C. 31, and *Robinson v. Harman*, 1 Exch. 850,—he may be liable for substantial damages for the loss of the bargain. Whereas *Flureau v. Thornhill* is an exception to the general rule that a man is responsible for all the damage resulting from his breach of contract, *Hopkins v. Grazebrook* has engrafted upon that exception another exception, viz. that, where the party enters into a contract to sell knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by *Flureau v. Thornhill* does not apply. Now, applying the rule thus qualified

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to the present case, it seems to me that the defendant was not to blame. Though he had not a right to sell what he professed to sell, inasmuch as it was an incorporeal hereditament which could only be granted under seal; yet, as a layman, he had a fair right to believe he had the power to sell which he professed to have, and therefore his case comes within the qualification of the rule as expressed in *Hopkins v. Grazebrook* and *Walker v. Moore*. That part of the plaintiff's argument, therefore, in my judgment, fails.

Then it was said, that, assuming that the plaintiff was not under the circumstances entitled to recover compensation in damages for the loss of the bargain, my Brother Crowder was wrong in ruling that he was not entitled to the costs of the deed and the subsequent negotiations. It seems to me, however, that the learned judge was right in the view he took in this respect also. If it could have been established, that, the contract being about to go off, on the representation or suggestion of Fuller, the plaintiff's attorney had prepared the deed of covenant for the purpose of supplying the defect in the title, and of carrying out the original contract, that would have been an expense incurred in endeavouring to perfect a title which was imperfect, and the defendant would have been liable. But that was not the case. It was early in the negotiation discovered that Fuller had not the thing to convey which he professed to sell; and there was a complete breach of the contract, and he had rendered himself liable to an action. Several things were then proposed,—first, a fresh bargain, at a reduced price; which was rejected,—secondly, that Mr. Commerell should be the grantor; which was rejected, because deemed incapable of being carried out,—thirdly, that Fuller should be the grantor, with a covenant for quiet enjoyment, relying on Mr. Commerell's position as a gentleman. Neither of these proposals was intended

to carry into effect the original bargain; but, failing that, for the purpose of substantiating another and a different contract. The deed was not prepared in consequence of any false suggestion on the part of the defendant, but in the bonâ fide belief on his part that Commerell would carry out the arrangement he proposed. It seems to me that there was no failure to complete the contract, or expense incurred, through any fault or mala fides on the part of the defendant; and that the costs in question were incurred, not in consequence of an ineffectual endeavour to cure a defect in the original title, but in an abortive attempt to carry out a new proposal, which he was always ready to fulfil. Upon these grounds, it seems to me that there was no miscarriage at the trial, and that the rule should be discharged.

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CRESSWELL, J. I am of the same opinion. We are not called upon here to investigate the grounds upon which the decision in *Flureau v. Thornhill* proceeded, or to pronounce any opinion as to the wisdom or the expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us now to call it in question. If it is to be over-ruled, it must be by a court of error, and not the same court or by a court of co-ordinate jurisdiction. Neither are we called upon to inquire whether or not the exceptions engrafted on the case of *Flureau v. Thornhill* by subsequent cases, have been wisely adopted. It may be that these exceptions were very wisely adopted, as tending better to effect the purposes of justice than the rule they professed to qualify. But I think the question for us to determine is, whether this case falls within the rule in *Flureau v. Thornhill* or within the exception introduced by *Hopkins v. Grazebrook*. I cannot entertain a doubt that it falls within the former. The defendant having a grant

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(though not a legal one) of the shooting, both parties acted under a bonâ fide impression that he had that to sell which he professed to sell. I cannot, therefore, see how the case can be brought within the exception in *Hopkins v. Grazebrook*: and therefore I think our judgment must be in favour of the defendant. With regard to the expenses of preparing the deed, it seems to me that it makes no difference whether that deed was prepared with a view to carry out the original contract, or as the result of a new bargain; because, if the plaintiff had caused it to be prepared as a mode of fulfilling the original contract by means of it, the defendant was willing to fulfil it,—he offered to execute the deed. If, indeed, the defendant had by any mistatement induced the plaintiff to incur the expense of that deed, he would have been responsible. But that does not appear to have been the case: he seems to have been willing to execute, and assigns a reason for thinking it will be effectual. As to the subsequent expenses, it is said that they at least were incurred with his assent, and therefore he is responsible for them. But, though they may have been incurred with his assent, I see no evidence of his assent that they should be borne by him. It seems to me very like the case of a vendor having delivered an abstract, and, certain necessary parties refusing to concur in a conveyance, he says to the purchaser "I have done all I can to complete: I can do no more," and the purchaser chooses to go on and incur expense in a futile endeavour to overcome the objection; in which case, I apprehend, the vendor could not be called upon to reimburse him that expense. I see no ground whatever for finding fault with the ruling of my Brother Crowder.

WILLIAMS, J. I am entirely of the same opinion. Upon the first point, which is one of great importance, and not a little difficulty, I entirely concur in the view

taken by my Lord and my Brother Cresswell. It is clear upon the authorities that the doctrine of *Flureau v. Thornhill*, which confined the damages to be recovered by a purchaser upon the vendor's failing to make a good title to nominal damages for the loss of the bargain, was well understood and considered to be law down to the case of *Hopkins v. Grazebrook*, and was always acted upon as such, not only in Westminster Hall, but also,—which was of much more importance,—in the chambers of the most eminent conveyancers. That appears from Sir Edward Sugden's work on vendors and purchasers. He there (11th edit. p. 424) states the general rule pretty much in the terms in which it has been stated by my Brother Shee. "If," he says, "the purchaser succeed in proving the title bad, he will, according to the counts upon which he recovers, obtain a verdict either for his deposit or for damages, which in most cases would be regulated by the amount of the deposit. If he declare on the common money counts, he of course cannot obtain damages for the loss of his bargain; and, even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title." This being the statement originally found in that work, when the noble and learned author comes to deal with the case of *Hopkins v. Grazebrook*, he observes upon it thus,—“This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood.” Between the decision in *Flureau v. Thornhill* and that of *Hopkins v. Grazebrook*, not only had the practice been as I have stated, but there had been two cases on this subject,—one, of *Bratt v. Ellis*, Sugd. V.

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& P., App. 1077, before Sir James Mansfield, a judge who had had much experience in the investigation of titles; the other, of *Jones v. Dyke*, Ib. 1078, before Macdonald, C. B.,—where the doctrine of *Flureau v. Thornhill* was recognised and acted upon. Thus far the vendor was held liable to nominal damages only for his failure to make out a good title, unless he was guilty of fraud in the transaction. It is difficult to state the reason for the distinction. The position of a vendor of real estate is somewhat hard. His title is submitted to the scrutiny of a skilful conveyancer well practised in the discovery of latent defects. One would think it quite punishment enough for him to be made to pay the expense of the detection of the fraud, without further infliction in the shape of damages for the fancied goodness of the bargain. In *Hopkins v. Grazebrook*, the court of Queen's Bench seem to have extended the doctrine of fraud to misconduct or indiscretion short of fraud, and to have held the vendor to be liable to something more than nominal damages, where he is so far to blame as to have contracted to sell before he had himself obtained a conveyance. When the case of *Walker v. Moore* came before the same court, they explain the difference between that case and *Hopkins v. Grazebrook*, and distinctly adhere to the old rule laid down in *Flureau v. Thornhill*. That case was followed by *Robinson v. Harman*, where the court of Exchequer profess to do no more than was done by the court of Queen's Bench in *Hopkins v. Grazebrook*, and hold themselves bound by *Flureau v. Thornhill*. It is true that here the defendant had a mere equitable title: but the facts shew that he did not know when he entered into the contract that he had not a perfectly good legal title. Ignorance of law is not that sort of misconduct which brings the case within the rule in *Hopkins v. Grazebrook*. With regard to the other part of the rule,

I think it is a mistake to say that the assumption that Mr. Commerell would not object to execute the grant, was the inducement for the plaintiff to buy: it was the inducement for the defendant to propose to enter into a covenant to indemnify the plaintiff, and that was all. Upon the whole, I agree with the rest of the court in thinking that the rule should be discharged.

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CROWDER, J. I am of the same opinion. As to the first point, the case must, I think, be governed by *Flureau v. Thornhill*, which has invariably been recognised as law ever since I have been in the profession. Even in the subsequent cases which have qualified the rule there laid down, *Flureau v. Thornhill* has been considered to have been well decided, or, at all events, it has not been shaken. It is now too late to call it in question; and this is not the proper tribunal to determine whether or not that case laid down the true rule. It is contended on behalf of the plaintiff that this case is an exception to the rule laid down in *Flureau v. Thornhill*; and *Hopkins v. Grazebrook* was cited and relied upon as an authority in point. I am, however, clearly of opinion that this case falls within *Flureau v. Thornhill*, and not within *Hopkins v. Grazebrook*. In *Hopkins v. Grazebrook* the defendant was blameable; he acted with undue precipitation in putting up to auction and thereby representing himself to be the owner of property which he had no right to sell. In this respect, he was guilty of something like misconduct. That is the ground upon which the decision of the court proceeded. Here, it seems to me, looking at the document drawn up by Commerell's attorney, and signed by both Commerell and the defendant, and which purported to be an agreement to convey the shooting to the defendant, the latter can hardly be charged with anything approaching to

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misconduct or mala fides. It is not every man who knows that the right of shooting is an incorporeal hereditament, and, being so, can only be conveyed by deed. Upon the first point, therefore, I am of opinion that there is no foundation for the rule. Then it was insisted that the expenses of preparing the deed of the 5th of April ought to have been allowed. That deed was either a new agreement, or it was an attempt to carry out the original agreement: and in either case it appeared to me that the defendant ought not to be called upon to pay the expenses. If it was a new agreement,—and there are many reasons for thinking so,—I cannot say that the expense of preparing it was part of the expenses of the original contract. And, if it was a mode of carrying out the original contract, it appeared to me that the defendant was ready to carry out the arrangement, but that the plaintiff would not let him, and therefore he ought not to pay for it. As to the rest, the defendant might have assented to the subsequent endeavours to carry out the contract, but there was no evidence of any assent on his part that those abortive attempts should be made at his cost.

Rule discharged.

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THE first count of the declaration stated that theretofore, the defendant being in possession of certain goods of the plaintiff, to wit, flax canvas, flax warp canvas, tarpauline, and rope, to the delivery whereof by the defendant to him the plaintiff he the plaintiff was then entitled, and then was desirous of having the same delivered to him, or the value thereof, to wit, 72*l.* 13*s.* 2*d.*, paid to him as and for the price thereof if the same should not be delivered to the plaintiff,—of all which the defendant then had notice; that thereupon then, and in consideration of the said several premises, it was agreed by and between the plaintiff and the defendant, that the defendant should on or before the 23rd of June, 1855, deliver the said goods to the plaintiff, or should retain and pay for the same the sum of 72*l.* 13*s.* 2*d.*; that the said 23rd of June, 1855, had long since elapsed and the plaintiff had done all things necessary, and all things had happened necessary to entitle the plaintiff to have the said goods delivered to him by the defendant, or to be paid the said sum of 72*l.* 13*s.* 2*d.*; but that the defendant had not delivered the said goods to the plaintiff, nor, although he had retained the said goods, had the defendant paid to the plaintiff the said sum of 72*l.* 13*s.* 2*d.*, or any part thereof, but had wholly refused, and still refused, to deliver the said goods, or to pay for them as aforesaid.

There were also counts for money payable by the defendant to the plaintiff for goods bargained and sold and sold and delivered by the plaintiff to the defendant,—for money found to be due from the defendant to the

A. sold goods to an infant, and delivered them to B. for the purpose of being worked up by him for the vendee. The vendee afterwards, and after a portion of the goods had been used in performance of the work, went with A. to B.'s shop, and desired that the remainder might be returned to A., B. thereupon said, "I will return them or pay for them" at a price then agreed upon:—Held, that it was competent to A. thus to rescind the contract without writing; and that, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B. to object that the rescission was void, as not being for the infant's benefit.

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plaintiff on accounts stated between them,—and a count alleging that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods, to wit, flax canvas, flax warp canvas, tarpauline, and rope.

The defendant pleaded, to the first count, that he did not promise or agree as therein alleged, and that the said goods were not the plaintiff's goods, nor was he entitled to have the same delivered to him, as alleged; to the second and third counts, never indebted; and to the last count, not guilty, and not possessed.

Upon these pleas the plaintiff joined issue.

By the particulars of demand delivered under the common counts, the plaintiff claimed as follows :—

	£	s.	d.
"To flax canvas	16	15	5
"To flax warp canvas	51	13	1
"To tarpauline	2	8	0
"To rope	11	19	4
	82	10	10
"Discount, as per agreement	9	16	8
	£72	14	2"

The cause was tried before Wightman, J., at the last assizes for Surrey. The facts were as follows :—

One George Havelock had down to the month of March, 1854, carried on business at Sunderland as a ship-builder, in partnership with one Robson. About that time they became bankrupt: and shortly afterwards George Havelock left Sunderland, and went to reside at Rochester with his two sons, Christian and Edward, where they established themselves in a ship-building yard. It did not distinctly appear by whom the business was carried on; but George Havelock (the father) was the person principally appearing in the business.

The plaintiff, who was a canvas and rope-manufacturer and ship-chandler, carrying on business at Sunderland and also at Wapping High Street, had been a creditor of Havelock & Robson. In November, 1854, George Havelock called at the plaintiff's shop in London, and asked the plaintiff if he would take an order from his, Havelock's, son Christian, who would pay him shortly from a ship he was then repairing. The plaintiff consenting, an order was shortly afterwards, viz. on the 21st of November, sent to him for a quantity of oakum and other articles, the letter containing it concluding as follows:—

"You will oblige by sending the same as soon as convenient, to Mr. C. Havelock, ship-builder, Rochester.
Yours, &c.

"P. Pro G. Havelock,
"Edward Havelock."

On the 24th of November, the plaintiff wrote the following reply, addressing it to *George Havelock*:—

"Your's containing order for oakums came duly to hand. As it will take three or four days before the white oakum arrives here, we cannot till after that time supply the same. All will be forwarded together. The price of white and brown oakum will be 80s. per cwt.

"Yours, &c.

"W. H. Douglas & Co."

On the 28th of November, the plaintiff received the following note, in the handwriting of *George Havelock*,—

"Please forward the oakum and the other things ordered, as early as possible, as we are in want of them.

"Yours, &c.

"C. Havelock."

On the 4th of December, the plaintiff received another note, also in the handwriting of *George Havelock*,—

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"Let me know per return if you can send the oakum and other things ordered, on receipt of this, as we cannot wait longer : the ship must be done this week.

"Yours, &c.

"C. Havelock."

These goods were on the day of the date of the last-mentioned letter, packed and forwarded to Rochester, addressed and invoiced to "Mr. Christian Havelock, ship-builder, Rochester," and the amount entered in the plaintiff's books to the debit of Christian Havelock.

In the month of April last, George Havelock called at the plaintiff's shop at Wapping, and informed him that his son was building a ship for Messrs. Langton & Sons, and that he would require canvas and rope for her sails and outfit, which he proposed to pay for by the Messrs. Langtons' acceptance as soon as the ship was finished. The plaintiff accordingly, on the 14th of April, wrote to Christian Havelock as follows :—

"We shall be glad to supply you long flax canvas No. 1, 14*d.* per yard ; flax warp canvas No. 1, 12*d.* per yard ; rope, 50*l.* per ton. Bolt-rope to do this ship's sails, we will charge the same price. Payment by Messrs. T. Langton & Sons' acceptance, date according to agreement.

Yours, &c.,

"W. H. Douglas & Co."

On the 28th of April, George Havelock called at the plaintiff's shop, and ordered the canvas, tarpauline, and rope which were the subject of this action, and also a barrel of pork ; requesting that the three first-mentioned articles should be sent to "Mr. Watson, sail-maker, Rochester," the defendant, who was to make the sails for the new ship, and the pork to Mr. Christian Havelock. The goods so ordered were sent as requested on the 30th, with an invoice, as follows :—

Mr. C. Havelock, Rochester,
To W. Douglas & Co., canvas, paint,
and rope manufacturers, sail-makers, ship-chandlers, &c.

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April 27.	7 bolts all flax, No. 1, 287½ yards, 14d.	16	15	5
	9 „ flax warp, No. 2, 371½ yards, 11½d.	17	15	7
	4 „ „ No. 3, 164½ yards, 10d.	7	10	7
	7 „ „ No. 4, 289½ yards, 10½d.	12	13	4
	5 „ „ No. 5, 206½ yards, 10d.	8	12	1
	3 „ „ No. 6, 128 yards, 9d.	5	1	6
	1 „ tarpauline, 43 yards, 12d.	2	3	0
	Rope, 4 cwt. 3 qrs. 4 lbs., at 50s.	11	19	4
	1 barrel of Irish pork, at 90s.	5	10	0
		£88	0	10

The above invoice was inclosed in a letter addressed to *George Havelock*, as follows:—

“ Wapping, 30th April, 1855.

“ Mr. G. Havelock.

“ Dear Sir,—We inclose invoice of goods sent to your address this day by train, amounting to 88*l.* 0*s.* 10*d.*, which we hope you will find correct. Can you procure for us Messrs. Langtons’ undertaking to accept on completion of the order. If you can, we shall feel obliged, and would like to receive same as early as possible. We likewise inclose your account for the oakum, &c., and would be glad to receive a remittance for the amount, 8*l.* 8*s.* 10*d.*

Yours, &c.,

“ W. H. Douglas & Co.”

George Havelock died on the 3rd of May. On the 18th, the plaintiff’s clerk went down to Rochester and saw Christian Havelock, who went with him to the defendant’s place of business, when it was agreed between them that the canvas, tarpauline, and rope which were then in the defendant’s possession should be taken by him at a reduction of 12½ per cent. from the invoice price, or that the goods should be returned by the defendant to the plaintiff.

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Christian Havelock, who was called as a witness on the part of the plaintiff, stated that he told the defendant, in the presence of the plaintiff's clerk, that he wished the canvas, &c. to go back to the plaintiff. Upon cross-examination, he stated that the business at Rochester was carried on by his father for him, that his father made the contract with Messrs. Langton, that he himself knew nothing about it, that he was about twenty years of age, that he worked in the yard, and that, when he wanted pocket-money, he got it from his mother, but never exceeding 1*s.* or 2*s.* a week.

It appeared that a portion of the canvas of the value of 5*l.* had been worked up by the defendant for the ship which was in course of building.

On the part of the plaintiff, it was insisted that the goods had been sold to Christian Havelock, the son; and the agreement of the 18th of June was relied on to support the special count.

For the defendant, it was insisted that the business was in reality the business of George Havelock, the father; and that, assuming that the contract was with the son, he, being a minor, could not convey the property in the goods, inasmuch as that would not be a transaction for his benefit; and, if he could, he could only do it by writing.

The learned judge overruled the objection, but reserved leave to move; and he left it to the jury to say to whom the credit was given, whether to the father or the son, and whether the defendant had agreed to return the goods or to pay for them, as alleged by the plaintiff. The jury returned a verdict for the plaintiff, damages 72*l.* 13*s.* 2*d.*

Bovill, in Michaelmas Term last, moved for a rule to shew cause why the verdict should not be entered for the defendant, pursuant to the leave reserved, on the

ground that Christian Havelock, being an infant, was not capable of conveying to the plaintiff the property in the goods in question, and that, if he were, it could only be done by a contract in writing: and also on the ground of misdirection on the part of the learned judge, in not giving effect to the defendant's objections of non-compliance with the statute of frauds on the alleged sale by Christian Havelock to the plaintiff, and that the property in the goods had not passed back to the plaintiff,—and that the verdict was against evidence. He submitted, that, if the contract for the sale of the goods had originally been made with Christian Havelock, the property vested in him, and, if so, he, being an infant, was incapable of making a contract to divest himself thereof. [*Jervis*, C. J. An infant, or one in privity to him, may object to a contract on the ground that it was not for his benefit. But, what right has a third party, a stranger, to say that the infant may not make what contract he pleases?] Then, assuming that that point is not open to the defendant, there was no contract in writing within the statute of frauds, and the goods were never in the plaintiff's possession after he once parted with them. The property having passed to Christian Havelock, could not be divested out of him by a mere parol agreement. [*Jervis*, C. J. Christian Havelock goes with the plaintiff's clerk to the defendant's, and the former communicates to the latter in the presence of the clerk his assent to the goods being returned to the plaintiff, and the defendant says "I will return them or pay for them;" and a price is agreed upon. What necessity was there for a contract in writing? It is a mere rescission of the contract as between Christian Havelock and the plaintiff, and a new contract with the defendant. (a) The defendant's agreement puts him in

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(a) See *Goss v. Lord Nugent*, 5 B. & Ad. 58.

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the situation of Christian Havelock.] At all events, the plaintiff cannot have a verdict for the value of the canvas which had been used by the defendant before the contract with Christian Havelock was rescinded. [*Jervis*, C. J. The plaintiff will consent to reduce the verdict to that extent. I think there should be no rule upon the first point: nor on the ground of the verdict being against evidence, unless my Brother Wightman reports to us that he is dissatisfied with the verdict; and the reduction of damages should not affect the costs of the rule.]

A rule having been granted accordingly,

Lush now shewed cause. The 17th section of the statute of frauds only applies to contracts for the sale of goods, wares, and merchandise; whereas, this is a mere rescinding of the sale, or a payment by delivery back of the goods. As to the evidence,—it was left to the jury to say to whom the credit was given; and there was abundant evidence to justify their verdict. The business was carried on in the son's name because the father was at the time an uncertificated bankrupt. The order for the goods was given in the son's name; he was debited in the plaintiff's books; and the invoice was made out and the goods addressed to him. If the son had been sued for the price, he clearly could not have contended that he was not liable. The plaintiff will, of course, consent to the verdict being reduced by the value of the canvas which had been used by the defendant before the time of the new bargain. The evidence clearly made out the contract stated in the first count; and, even if that failed, there was enough to charge the defendant for goods sold and delivered.

Bovill, in support of his rule. The evidence clearly shewed that the contract was with the father, and not

with the son. The circumstance of the father being an uncertificated bankrupt in truth amounted to nothing; the infancy of the son created an equal or even a greater degree of incapacity in him, seeing that he might take the benefit and at the same time repudiate the burthen of contracts made with him. The order for the goods was given by the father; and the letter inclosing the invoice was addressed to him. The son, according to his own account, had nothing to do with the business. He did not take the profits; nor did he know anything about the business. He himself stated, that, when he wanted a shilling or two for pocket-money, he was in the habit of asking his mother for it. He admitted that he knew nothing about the ship that was building, nor even the names of the intended owners. The fair result of all the evidence, was, that the business was the father's business, and the goods the father's property. The rule as to the vesting of goods in the vendee is well expressed in the judgment of this court in *Spartali v. Benecke*, antè, Vol. X, p. 223,—“It is now undoubted law, that, by a sale of specific goods for an agreed price, the property passes to the buyer, and remains at his risk: *Rugg v. Minett*, 11 East, 210, *Hinde v. Whitehouse*, 7 East, 558, and many other cases.” That is undoubtedly the correct rule, whether the goods are sold upon credit or not. Assuming that the contract was with Christian Havelock, the son, and that he agreed to sell them back to the plaintiff, there was no delivery, acceptance, or receipt to satisfy the statute of frauds. The words of the 17th section of the 29 Car. 2, c. 3, are, that “no contract for the sale of any goods, wares, and merchandises for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or

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memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." Here the goods were never delivered: they remained in the possession of the defendant. No one requisite of the statute has been complied with. [*Williams, J.* Might not the transaction amount to payment?] There was no handing over. [*Williams, J.* The vendee consents to the vendor having the goods back. May not a man pay another a debt by saying to him, "A. B. has goods of mine which you may take in satisfaction of your debt," and at the same time authorising A. B. to hand them over?] It is submitted that there is no such head of transfer of property known to the law. [*Cresswell, J.* I differ from you.] The property in the goods being in Christian Havelock, it could only get back by sale or by gift. There was no evidence of sale, gift, or delivery: and there was no other way in which the property could pass. [*Jervis, C. J.* Delivery was not essential if the holder assented, as the defendant did here. *Cresswell, J.* A. B. has goods in the warehouse of C. D., which he sells to E. F.; E. F. takes a purchaser with him to the warehouse, and sells and delivers those goods to his vendee,—where is the delivery to E. F.?] In that case there would be a delivery, or that which amounts to a delivery, to one who for that purpose would be the agent of the first vendee, viz. the warehouse-keeper. [*Cresswell, J.* So, here: Christian Havelock goes to Watson, who has the goods in his possession, and, instead of selling them to a third person, Douglas, with Christian Havelock's consent, sells them to Watson himself. It is like the common case of an attornment of a warehouse-keeper to a purchaser. That amounts to a complete delivery and acceptance.] At the time that alleged bargain was made between Douglas and Watson, the property in the goods had not passed

back from Christian Havelock to Douglas. It clearly had not re-vested for the purposes of the first count: and for the same reasons the plaintiff's right to recover upon the common counts is equally defective.

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JERVIS, C. J. I am of opinion that this rule should be discharged. The point raised upon the first count is disposed of by the form in which the objection presents itself. It is said, that, at the time of the bargain upon which that count is founded, the property in the goods in question had not passed from Christian Havelock to the plaintiff. In order to deal with this objection, it is necessary in the first place to consider whether the verdict was against evidence, because the basis of Mr. Lush's argument is, that the property passed. Mr. Bovill contests that, and says that there was no evidence to warrant the conclusion that the original contract for the sale of the goods was made with Christian Havelock, the son. That was entirely a question for the jury. There was evidence on both sides, and they found that the contract was with the son, and not with the father. That being so, the case stands thus:—Christian Havelock carried on the business of a ship-builder at Rochester. Being employed to build a ship for Messrs. Langton, he contracts with the plaintiff for the purchase of canvas and other things, to be delivered at Rochester to the defendant, who was employed to make the sails and rigging. The goods being sent, but not paid for, and the plaintiff pressing for a settlement, Christian Havelock proposes to him to take the goods back. Mr. Bovill says that the property in the goods being by the contract of sale vested in Christian Havelock, and there having been no contract in writing, and no actual delivery of them back from Christian Havelock to the plaintiff, the property in them did not pass to the latter. I think, however, there

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was abundant evidence that the property did pass. What are the facts? The plaintiff is a creditor of Christian Havelock. He says to him,—“I have certain goods in the hands of Watson, a depository selected by me: you may have them in satisfaction of your debt.” Accordingly, Christian Havelock goes with the plaintiff's clerk to Watson, and either of two things happens,—either Watson, in the presence of Christian Havelock and the plaintiff's clerk, says, “I will attorn to you, and hold the goods as yours,” or the transaction amounts to a sale by the plaintiff to Watson of goods which the latter had acquired with the assent and permission of Christian Havelock. It was a gift with an attornment, or a sale and delivery from one principal to the other, and the 17th section of the statute of frauds has no application. The rule will, therefore, be discharged; the verdict being reduced, as agreed, by 5*l.*; but the costs of the rule will not be affected by such reduction.

The rest of the court concurring,

Rule discharged.

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TOMKINSON and JOHNSON v. STAIGHT.

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THIS was an action for goods sold and delivered, and goods bargained and sold.

Pleas, never indebted, and payment.

The cause was tried before Cresswell, J., at the second sitting in Middlesex in the last term. The facts which appeared in evidence were as follows:—The plaintiffs were piano-forte makers, the defendant a dealer in ivories for pianos. On the 6th of August, 1855, the plaintiff Johnson called at the defendant's shop, and asked him to discount for him a bill at four months' date for 22*l.*, drawn by the plaintiffs upon and accepted by one Mott. The defendant took the bill, giving Johnson 15*l.* 16*s.* in cash, and goods to the value of 5*l.* 2*s.*, and deducting 1*l.* 2*s.* for discount. On the 14th of August, Johnson again applied to the defendant to discount another acceptance of Mott's at the same date, for 18*l.*, and received for it 12*l.* 6*s.* in cash, and goods to the value of 4*l.* 16*s.*, the discount charged being 18*s.*

The defendant shortly afterwards called at the plaintiffs' shop, and selected a piano-forte for which the price agreed on was 15*l.* 10*s.* The piano was accordingly sent to the defendant's premises, with an invoice making him the debtor. The defendant refusing to pay for the piano or to return it, but insisting that the bargain was that it should remain as security for the bills, this action was brought for the price.

The defendant, who gave evidence at the trial, stated that he was acting merely as the servant of one Collins, whose name was over the shop door, and in whose name the goods sold by him to the plaintiffs were invoiced; that the agreement between him and Johnson was, not

A. sold a piano-forte to B. for 15*l.* 10*s.*, and delivered it at B.'s shop. B. kept it, but refused to pay for it, alleging that it was delivered upon an agreement that it should remain as security for the payment of certain outstanding bills which he had discounted for A. In an action for the price of the piano-forte,—Held, that there was a sufficient "acceptance" within the 17th section of the statute of frauds; and that parol evidence was admissible to shew the *terms* of the bargain.

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that the piano should be paid for in cash, but that it (and another what the plaintiffs also agreed to send) should remain as a security for the bills which he had discounted for them; and that Mott, the acceptor, had become insolent before the bills arrived at maturity.

It was insisted, on the part of the defendant, that, assuming the plaintiffs' version of the transaction to be the true one, inasmuch as there had been no agreement or memorandum in writing, and no *acceptance* of the article within the 29 Car. 2, c. 3, s. 17, the plaintiffs could not recover.

The learned judge left it to the jury to say whether the transaction took place with the defendant as a principal, and whether they thought the piano-forte had been sold, or merely deposited as security, as alleged by the defendant.

The jury returned a verdict for the plaintiffs for 15*l.* 10*s.*; and the learned judge reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion that there had been no sufficient acceptance to satisfy the statute.

Byles, Serjt., in Hilary Term, accordingly obtained a rule nisi. He referred to *Phillips v. Bistolli*, 2 B. & C. 511, 3 D. & R. 822, and *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

J. Brown now shewed cause. It is not denied that the piano-forte was ordered and delivered: but it is objected that there was no *acceptance* by the defendant under the contract alleged on the part of the plaintiffs, but that the instrument was delivered under a different contract, viz. to be held as security for the payment of Mott's acceptances. The learned judge, however, was not asked to leave that question specifically to the jury. The words of the 17th section of the 29 Car. 2, c. 3,

are,—“No contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.” On the part of the defendant, the argument will be, that the acceptance, to satisfy those words, must be such an acceptance as will be equivalent to a contract in writing shewing all the terms of the bargain. That, it is submitted, is not the meaning of the statute. Its real meaning is, that, if the party has received the goods, and kept them, that affords ground for a strong presumption that there has been some contract between them, and in that case a jury may find the terms of the contract on oral testimony. This precise objection seems to be taken now for the first time. In *Phillips v. Bistolli*, 2 B. & C. 511, 8 D. & R. 822, which was cited on moving for this rule, the facts were these:—By the conditions of a sale by auction, the purchaser was to pay 80 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid. It was held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. [*Cresswell*, J. There is one material distinction between that case and the present, viz. that there the goods were returned. Suppose the defendant

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had kept the jewels, insisting upon having them at the lower price, and the jury had found that the agreement was for a sale at the higher price,—how would the case have stood then?] That clearly would have amounted to an acceptance. The court there say,—“In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case to make out that there was such delivery and acceptance. Now, here, by the printed conditions of sale, a deposit of 30 per cent. was to be paid upon the party being declared the highest bidder, and the residue of the purchase-money when the goods were removed; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until the deposit or price was paid. There was, therefore, very slight evidence to shew that the plaintiff intended to part with all control over the goods when he delivered them. Then, was there any acceptance by the defendant as owner? It appears that a very short interval elapsed after the lot was knocked down, before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened, was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by the defendant as owner, and it ought, at least, under all the circumstances, to be submitted as a question of fact to the jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other.” To hold that there can be no acceptance if there be any variance from the terms proposed by the vendor, would be placing a most mischievous

construction upon the statute. All that the 17th section means, is, that, where a delivery and acceptance are shewn, the jury are at liberty to inquire what were the terms of the bargain. Suppose the goods had been consumable goods, and had been actually consumed by the vendee,—would that amount to an acceptance of them? Or, suppose they were destroyed by fire whilst in the warehouse of the vendee, whose would have been the loss? [*Crowder, J.*, referred to *Morton v. Tibbitt*, 15 Q. B. 428, where it was held, that an acceptance and receipt under the statute do not preclude the purchaser of goods from objecting to the quantity or quality of the goods, or disputing the fact of the performance of the contract, but that the effect of them is only to dispense with the necessity of a written memorandum of the contract.] The result of the cases on this subject is thus stated in a note to the 17th section of the statute of frauds, in 2 Chitty's Statutes, 148, n. (c),—"In order to satisfy the statute by *an acceptance* of the goods, the contract of sale must be perfect; there must be a change of possession, a delivery of the goods by the vendor, with an *intention of vesting the right of possession* in the vendee, and an acceptance by the latter with an *intention of taking possession as owner* (see *Phillips v. Bistolli*, 2 B. & C. 511, 3 D. & R. 827; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Dixon v. Yates*, 5 B. & Ad. 539; *Bill v. Bament*, 9 M. & W. 36); and such intention is a question for a jury (Ib.; *Blenkinsop v. Clayton*, 1 J. B. Moore, 328; *Edan v. Dudfield*, 1 Q. B. 302). A *delivery* of the goods to an *agent* of the vendee suffices: thus, the delivery of goods, verbally ordered, to a carrier, is sufficient, where the purchaser has been in the habit of receiving goods for the vendee by similar conveyances (*Hart v. Sattley*, 3 Campb. 528), though the carrier be not named by the vendee (*Dutton v. Salomonson*, 3 B. & P. 582). But the *acceptance* by a carrier is no ac-

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ceptance by the vendee (per Parke, B., *Johnson v. Dodgson*, 2 M. & W. 656; *Hanson v. Armitage*, 5 B. & Ald. 557; *Anderson v. Hodgson*, 5 Price, 680).” The verdict finds that the defendant had no right to keep the piano, except under the contract of sale. Surely, it is not competent to the defendant to say that he was a tortfeasor. Then, as to that part of the rule which seeks for a new trial on the ground that the verdict was against evidence,—[*Cresswell*, J. I must confess I should not have come to the conclusion the jury came to: but, at the same time, I cannot say that I am dissatisfied with the verdict.]

Byles, Serjt., and *Sumner*, in support of the rule. The 17th section of the statute of frauds says, that “no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods *so sold*, and actually receive the same, or give something in earnest to bind *the bargain*, or in part of payment,” &c. The earnest is to bind *the bargain*, or to be in part payment: the acceptance must be of part of the goods *so sold*. It is asked, suppose the goods sold were articles of consumption, and were actually consumed by the vendee, or suppose they were destroyed by fire whilst in his warehouse, is he not to pay for them? It is not denied that he must pay for them: the question is, what is to be the form of action? Did the defendant get this piano upon the contract or bargain so made? [*Cresswell*, J. The words “so sold” in the 17th section mean, sold for the price of 10*l.* or upwards.] It is submitted they mean “sold upon the terms agreed upon.” Alderson, B., in *Elliott v. Thomas*, 8 M. & W. 170, says,—“What are ‘the goods so sold?’—the goods sold by that contract.” [*Cresswell*, J. Here the jury have found what the contract was.] The question was

not properly submitted to them. The acceptance must be such as to admit a liability to pay. In *Maberley v. Shepherd*, 10 Bingh. 99, 102, 3 M. & Scott, 436, 443, Tindal, C. J., delivering the judgment of the court, says,—“Unless there has been a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance of the latter, with an intention of taking possession as owner, the statute is not satisfied.” In *Tempest v. Fitzgerald*, 3 B. & Ald. 680, A. agreed to purchase a horse of B. for ready money, and to take him within a time agreed upon. About the expiration of that time, A. rode the horse, gave directions as to its treatment, &c., but requested that it might remain in B.’s possession for a further time, at the expiration of which he promised to fetch it away and pay the price: to this B. assented. The horse died before A. paid the price or fetched it away: and it was held that there was no acceptance of the horse within the meaning of the statute of frauds. Abbott, C. J., there said: “The word *accepted* imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound.” In *Phillips v. Bistolli*, 2 B. & C. 511, 3 D. & R. 822, the court lay it down distinctly, that, “in order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner:” and that “it lies upon the plaintiff to make out that there was such delivery and acceptance.” In *Bill v. Bament*, 9 M. & W. 86, the defendant ordered goods of H., the del credere agent of the plaintiff, at a stipulated price, to be paid for on delivery; and, on receiving notice that the goods had arrived at H.’s warehouse, the defendant went there, and directed a boy whom he saw there to

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put a certain mark on the goods. On the defendant's afterwards refusing to receive the goods by reason of a dispute about the price, an action was commenced against him by the plaintiff; after which, at H.'s request, the defendant wrote in H.'s ledger, at the bottom of a page containing the statement of the goods in question, and headed with the plaintiff's name, the words "Received the above," which he signed: and it was held that there was no evidence to go to a jury of a delivery and acceptance sufficient to satisfy the statute of frauds. Parke, B., there says,—“To take the case out of the 17th section, there must be both *delivery* and *acceptance*.” The cases of *Baldey v. Parker*, 2 B. & C. 37, 3 D. & R. 220, *Lillywhite v. Devereux*, 15 M. & W. 285, and *Morton v. Tibbitt*, 15 Q. B. 428, are also distinct authorities to shew that there must be an acceptance by the buyer, with an intention of becoming the owner of the goods upon the terms of the bargain. [*Cresswell*, J. I cannot see how the acceptance in any case assists in proving the bargain.] Here, the defendant did not accept the piano-forte upon the terms of the bargain intended by the plaintiffs, and he tells them so. [*Cresswell*, J. The plaintiffs have done all they could to deliver the article, and the defendant keeps it.] It is clear that a memorandum in writing, to satisfy the statute of frauds, must contain all the terms of the contract. So, as to part payment, it must be a payment to bind *the* bargain,—that is, the bargain set up by the plaintiff. And the acceptance, it is submitted, must in like manner be an acceptance in pursuance of the contract.

JERVIS, C. J. I must confess that my mind has wavered considerable in the course of the discussion of this case. At one time, I was strongly inclined to think that there was no sufficient acceptance within the

17th section of the statute of frauds. But, upon the best consideration I am able to bring to bear upon the matter, I am now satisfied that there was a sufficient acceptance, and consequently that the rule should be discharged. In order to satisfy the statute, a contract for the sale of goods, wares, and merchandises *for the price of 10*l.* sterling or upwards*, must be in writing, or there must be an acceptance by the buyer of part of *the goods so sold*, or a part-payment. I think the words "so sold" mean, sold "for the price of 10*l.* sterling or upwards." There is no doubt there was in this case a delivery of goods which the plaintiffs say were sold for ready money above the value of 10*l.*; and there is no doubt there was an acceptance of the piano-forte, as the defendant says he received it upon certain terms, viz. that it should stand as a security for the payment of the two bills. It is as if the defendant said that he accepted the goods at six months' credit. It is, therefore, agreed on both sides, that there has been a parting with the goods by the seller and an acceptance by the purchaser; the only difference between them being as to the period of payment. The jury have found a delivery and an acceptance upon the terms of payment as alleged by the plaintiffs. The case really does not differ from the case I put, where the one party says, "I sold and delivered to you goods to be paid for in ready money;" and the other says, "No: I bought at six months' credit, and you have brought your action too soon." It certainly is somewhat strange that the question does not appear to have ever occurred before. That of itself would seem to afford a strong argument to shew that the construction sought to be put upon the statute by the defendant is not the true construction. I think the defendant is precluded by the finding of the jury, and that the rule should be discharged.

CRESSWELL, J. I am of the same opinion. After

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the finding of the jury, we must assume that there was a sale of the piano-forte by the plaintiffs to the defendant. Undoubtedly there was a delivery of it which was intended on the part of the plaintiffs to make the defendant the true owner. The defendant was told that the piano-forte was upon his premises, and he assented to the contract so far as the making him the true owner. He kept it, and still keeps it. He is precluded, therefore, from saying that he did not accept it upon the true terms of the bargain, whatever they were. There was, therefore, a delivery to him as owner, and an acceptance by him as owner. He disputed the terms upon which he agreed to become the owner. The jury have settled that by their verdict. I think the case is removed from any objections arising on the 17th section of the statute.

WILLIAMS, J. I am of the same opinion. I think there was a sufficient acceptance and receipt of the piano-forte by the defendant to satisfy the 17th section. No doubt, the defendant accompanied the acceptance with a repudiation of a term in the bargain which was essential to the maintenance of the action; and I certainly for some time felt a difficulty in saying that any evidence could be received to supply the place of writing, which, instead of an admission, amounted to an absolute denial of the contract. But, upon fuller consideration, I think the statute is satisfied by proof that the defendant has accepted the goods in the character of vendee. The 17th section of the statute of frauds provides that no contract for the sale of goods, wares, and merchandises for the price of 10*l.* or upwards, shall be allowed to be good, unless some note or memorandum in writing *of the bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised; but it makes exceptions in cases where something has been given in earnest to bind the bargain or in part-payment, or where the buyer "shall accept part of the

goods so sold, and actually receive the same." The legislature has thought, that, where there is a fact so consistent with the existence of a contract of sale as the actual acceptance of part of the goods sold, the necessity of written evidence of the contract might safely be dispensed with, But it is clear that it was not meant to go to all the terms of the contract; and that acceptance is no evidence of the price, but only establishes the broad fact of the relation of vendor and vendee. So, where there is proof of part-payment, the jury must settle all the other facts which go to make up a contract. In the present case, I think there was a sufficient acceptance to establish the relation of vendor and vendee between the parties, though the defendant denied the terms on which he accepted the piano-forte; and consequently that all the requirements of the 17th section of the statute have been complied with.

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CROWDER, J. I am of the same opinion. I think there was an acceptance within the 17th section of the statute of frauds. There being such acceptance, that entitled the plaintiffs to lay before the jury by parol the other terms of the contract. I agree with my Brother Williams in thinking that the statute cannot mean that the acceptance must be such as to make it clear that all the terms of the bargain are mutually agreed upon. It seems to me that the only meaning which can be properly affixed to the statute, is, that there should be a contract of sale, and an acceptance and receipt by the vendee in the character of owner of the goods contracted to be sold, leaving it to parol evidence to shew what the precise terms of the bargain were. Here, the defendant received the goods and kept them; and the jury have found what the terms of the contract were upon which he so received them. I think the rule must be discharged.

Rule discharged.

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In the Matter of the Acknowledgment of ELIZABETH
PRICE, the Wife of GEORGE UVEDALE PRICE.

Jan. 21.

A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "*Edward C. Jones*," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners; but Jones signed the certificate and affidavit of verification "*Edmund C. Jones*." The court allowed the documents to be received and filed, upon the production of affidavits showing that *Edmund C. Jones* was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "*Edward C. Jones*," and that there was no other collector of that name in the company's service.

A COMMISSION was directed to "*Robert Keays*, Esq., judge, *Edward Champagné Jones*, Esq., collector, *Edward Evedon Fawcett*, Esq., and *Henry Wilson Reeves*, Esq., revenue commissioners, of Poonah, in the East Indies," to take the acknowledgment of Mrs. Price of a deed for the passing of her estate in certain property pursuant to the 3 & 4 W. 4, c. 74.

The acknowledgment was duly taken at Poonah before "*Henry Wilson Reeves* and *Edmund Champagné Jones*," two of the above-named commissioners.

In order to obviate the objection arising from the fact of the second commissioner signing his name "*Edmund Champagné Jones*," the commission being directed to "*Edward Champagné Jones*," the affidavit of a clerk in the secretary's department in the East India House, Leadenhall Street, was produced, in which the deponent stated that he was well acquainted with the hand-writing of *Edmund Champagné Jones*, a magistrate and collector lately stationed at Poonah, and that the signatures "*E. C. Jones*" respectively subscribed to the certificate and to the jurat of the affidavit of verification, and which signatures he (the deponent) had compared with the documents signed by him and lodged in the secretary's department aforesaid, were of the proper hand-writing of the said *Edmund Champagné Jones*; that the said *Edmund Champagné Jones* was on the day of the date of the commission (June the 23rd, 1855)

stationed at Poonah as magistrate and collector there, and that he continued there as such magistrate and collector till the 27th of August, 1855, and later; and that, at the date of the jurat of the said affidavit, the said Edmund Champagné Jones was duly authorised to swear affidavits at Poonah; and that, through inadvertence, the name of the said "*Edmund* Champagné Jones" was entered "*Edward* Champagné Jones" in the list of the officers in the company's service.

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Gates moved that the proper officer might be directed to receive and file the commission and affidavits. [*Jervis*, C. J. Your affidavit only shews that the acknowledgment was taken before a person to whom the commission was not addressed. I think you should have an affidavit making out the identity of the commissioner a little more clearly, and also an affidavit from the solicitor who applied for the commission, shewing that Edmund Champagné Jones was really the person to whom it was intended to be directed.]

Gates accordingly, on a subsequent day, produced an affidavit of another clerk in the secretary's department of the East India House, stating that the said Edmund Champagné Jones was on the 23rd day of June, 1855, stationed at Poonah as collector, and continued there as such collector till after the 27th of August, 1855 (the day on which the acknowledgment was taken), and that, during all that time the said Edmund Champagné Jones was a magistrate, and was authorised to swear affidavits at Poonah; that, through inadvertence, in compiling the East India Register in the secretary's department, the said Edmund Champagné Jones in the published lists of the officers in the company's service, had ever since the year 1830, appeared as '*Edward* Champagné Jones' instead of '*Edmund* Champagné Jones;' that the

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real name of the collector at Poonah on the 23rd of June, 1855, and thence until the 27th of August, was, Edmund Champagné Jones; and that there was not during all the time aforesaid, nor is there, a person of the name of Edward Champagné Jones, a collector at Poonah; and that there was not during all the time aforesaid, nor is there, at Poonah, any person of the name of Edward Champagné Jones in the service of the East India Company.

He also produced an affidavit of the attorney who prepared the commission, stating, that the error in the name arose from the mistake in the register at the East India House; and that "the person intended to be designated in the said commission was *Edmund Champagné Jones*, collector and magistrate at Poonah at the date of the said commission."

JERVIS, C. J. I think the objection is now removed, and the commission and affidavits may be filed.

The rest of the court concurring,

Rule accordingly.

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WILLIAM HULSE v. JOSEPH HULSE and Others, Executors of THOMAS PYE, deceased.

Jan. 18.

THE first count of the declaration was upon a promissory note alleged to have been made by Thomas Pye in his life-time, dated the 13th of November, 1849, whereby he promised to pay to the plaintiff on demand 3000*l.*, with interest at 5*l.* per cent. per annum.

To constitute the rendering of future services by the payee a good consideration for the making of a promissory note, there must be some binding contract for such services.

There were also counts for money lent to, and upon accounts stated with, the testator in his life-time, and upon accounts stated with the defendants as executors.

The defendants pleaded, to the first count,—first, that Thomas Pye did not make the note as alleged,—secondly, that the said Thomas Pye made the said alleged promissory note in that count mentioned, for the accommodation of the plaintiff, and without any consideration or value for such making thereof, or the payment thereof by the said Thomas Pye, and that the plaintiff had always held, and still held the said note without any value of consideration whatever,—thirdly, that the said Thomas Pye was induced to make and did make the said promissory note through the fraud, covin, misrepresentation, and deception of the plaintiff. To the residue of the declaration, they pleaded never indebted.

Upon each of these pleas the plaintiff joined issue.

The cause was tried before the Lord Chief Baron, at the last Stafford Assizes. The facts were as follows :—The plaintiff, William Hulse, was a nephew of Thomas Pye, the testator. The defendants Joseph Hulse and Thomas Hulse were also nephews of Pye. The note

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 form :—

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“ £3000 0 0

“ Longton, Nov. 13, 1849.

“ On demand, I promise to pay to William Hulse, or his order, the sum of three thousand pounds, for value received, together with interest at the rate of five per cent. per annum.

“ Thomas Pye.

“ Witness,

“ Samuel Burgess.”

The deceased, Thomas Pye, for many years carried on the business of a coal-master at Adderley Green, in partnership with one Sterratt. The plaintiff acted as his clerk at a salary of a guinea a week and afterwards 30s. a week. In addition to his services as clerk, the plaintiff received the rents of some cottages for his uncle, and was employed to “ latch” the collery, and in rendering various other services for which he received no remuneration except on one occasion, many years ago, a gift of 20*l*. The testator had many times been heard to say that his nephew (the plaintiff) conducted his business in a very satisfactory manner, and that he would reward him for his attention. In the month of November, 1849, the testator desired the plaintiff to see a Mr. Whiston, who, it appeared, was clerk to a solicitor in the neighbourhood of Longton, and ask him to appoint a time to take instructions for his will. The plaintiff accordingly saw Mr. Whiston, and an appointment was made. The plaintiff and the testator attended the appointment, at the office of a Mr. Young, a solicitor at Longford, and instructions were given for the making of the will. The draft will contained a devise of 100*l*. a year to the plaintiff, charged upon two undivided third

parts of the testator's real estates, and, subject thereto, the whole of his property real and personal was given to the plaintiff, his brother Thomas, and another nephew of the testator, named Thomas Pye Seabridge. The testator at the time assigned the plaintiff's services as his reason for giving him 100*l.* a year more than he gave to the others. When they met for the purpose of reading over the draft will, Mr. Whiston explained to the testator the inconvenience of charging two undivided third parts of his property with an annuity of 100*l.* a year, and that in favour of the devisee of the other undivided third; and proposed that he should give the plaintiff a sum of money instead. The testator said he would either give him money or security, and that they could settle the amount between themselves. The will was accordingly altered, and afterwards copied and executed by the testator in the presence of two witnesses. The promissory note in question was given by the testator to the plaintiff the next day; it being understood that the plaintiff was not to ask for the amount of principal and interest until after the testator's death. Another will was afterwards made, by which the testator left the whole of his property (about 25,000*l.*) equally amongst fifteen nephews and nieces.

Burgess, the witness who attested the testator's signature to the note, who was called at the trial, stated that he was called in to see Mr. Pye sign something; that a piece of paper was presented with the bottom turned down, the name Thomas Pye being written thereon in pencil; that he saw the testator write his name over the pencil marks; and that he then wrote his name in the corner as the attesting witness.

Nothing was heard of the note until after the death of the testator.

Amongst his papers, the executors found several

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The plaintiff, in giving his evidence, stated, that, when the testator gave him the note for 3000*l.*, he said to him,—“ Will ; thee shall not want for nothing.”

On the part of the defendants, it was submitted that the plaintiff's own evidence proved the second plea ; for that the gratuitous services rendered by the plaintiff to the testator,—whether past or future,—formed no valid consideration for the the giving of the note.

His lordship, however, declined to stop the case, stating that a promissory note was a chattel which might be the subject of a gift, like a silver candlestick or any other article ; that, if the nephew had performed services in the hope of being named in his uncle's will, and the latter gave him the note instead, it would be a perfectly good consideration. And he ultimately summed up the case to the jury to the following effect :—

“ It does not properly belong to me, but perhaps I may say that I have not often seen any person behave in a court of justice, when giving evidence, in a better, a more becoming, or a more straight-forward manner than the plaintiff himself did while he was giving his evidence. It was remarked, and very naturally, that, as far as he himself was giving evidence, it was in his own favour ; but I think it right to observe, that, when the legislature passed a law that plaintiffs and defendants should be witnesses, there is no doubt that it was meant to put them on the same footing as other witnesses ; and that, if you, the jury, looking at their demeanour, weighing the testimony they were giving, and exercising your own judgment upon the matter, believed that what they said was true, you should act upon that belief ; and that a man may recover a verdict upon his own single testimony, and may get rid of a demand upon his own single

testimony, and it is not necessary that there should be any confirmation of it. There is, however, in this case, a remarkable confirmation, as far as the transaction itself goes. There is the confirmation of the attorney's testimony who prepared a draft will, and then made out the will itself which was executed by Thomas Pye: there is the confirmation of the attesting-witness; he says, 'I attested it, and it was somehow turned down.' It was turned down when Pye wrote his name to it; so that Pye had notice that the attesting-witness was attesting what he was signing with the paper turned down. The probability is, that Thomas Pye could not then have been imposed upon, as if he was signing something of the nature of which he had no notion. He must have known it was a matter of some serious import,—so serious that the attesting-witness was not allowed to see it; and therefore he would probably take care to be well apprised what the contents were. [His lordship then observed upon a transaction which took place about three weeks before the testator's death, viz. a payment of a small sum into the testator's account at his banker's, and the drawing of three cheques for the whole balance (1600*l.*), in favour of three of his nephews: and proceeded as follows] :—

"Gentlemen, as I have said before, it is certainly not a very edifying scene to have this sort of partition going on about the sick man's bed,—of which we have heard something within the last twelve or eighteen months with reference to the general affairs of Europe,—to have people looking about,—'Well, what is his cash balance? Why, if you will pay in 25*l.* 5*s.* 8*d.*, it will just make up 1600*l.*, a convenient sum to divide amongst ourselves.' Accordingly, it is divided in that way. There it is: and they have got it.

"But, gentlemen, the question which you have to decide, is,—Do you believe that Thomas Pye put his

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name to that note, knowing what he was doing? Now, a number of men have come to attest,—not executors of the deceased, not brothers of the plaintiff, not relatives of any party to the suit,—but, as far as one can judge, persons who knew him (the testator) well, and several of them most intimate friends. They come to speak to expressions, which, if you believe them to have been used, make the case really very clear in point of feeling and good intention on the part of the testator. It appears that services *had been rendered*. It is quite clear that services *were rendered afterwards*. The probability, therefore, is, that services *were expected to be rendered continuously*; and that is the point that I shall put to you with reference to these pleadings.

“Now, the pleas are these,—that the testator did not make the note. Do you believe that he executed that promissory note with an understanding that it should not be used in his life-time; that it should remain as a claim not to be made till he was dead; but that it should bear interest in the mean time? Do you believe that he executed that note, and put his name to it, knowing what it was, and thoroughly understanding the nature of the obligation? If he did, then the first plea must be found for the plaintiff,—that he did make it: and the last plea also must be found for the plaintiff,—that he was not induced to make the note through the fraud, covin, misrepresentation, and deception of the plaintiff. And, *if you think that that arrangement was made with an understanding between the parties, not only that he should accept that as a gift for what was past, but that it should be a remuneration to him in respect of future services to be rendered as long as the old man should require them,—then, if that is your opinion in point of fact, I am of opinion in point of law that was a good consideration.*

“The defence, gentlemen, is this,—The learned

counsel wanted you to find that he had *given*. Now, the word 'given,' you know, is an exceedingly ambiguous thing. Giving frequently means merely handing over. A man says 'I gave 100*l.* for that horse:' he does not mean that the 100*l.* was a gift, though the word 'give' is used. The word is quite ambiguous. But the defence is this,—It so happens that there is a piece of law by which, if a man promises to do something, and he promises it out of pure liberality, he cannot be compelled to perform his promise. There is no doubt that that is the law. I dare say it is very good. I have no right here to do anything but administer the law. I have no right to alter it or abuse it; and I do not propose to do so. I dare say it is exceedingly right and proper; but it is certainly not a matter which especially and remarkably recommends itself to one's sense of justice. Here is a young man who from ten years of age has been manifestly serving his uncle quite as faithfully, if not more so, than Jacob served his father-in-law fourteen years,—seven years for one wife, and seven for another. When he (the testator) gets to be a very old man (he was past seventy when any of these transactions took place, and he was a hard-working old man, dying at last chiefly of old age), he is minded to do something liberal and generous to this young man. He proposes to give him 100*l.* a year for ever,—to him and his heirs for ever. That is worth more than 3000*l.*: it is not worth less: supposing the funds to be at 100*l.*, it is worth more. He gives him a note: and the learned counsel for the defendant invites you to find that it was a gift,—a pure gift: and the more he can make it the mere exercise of the purest liberality, nothing but generosity. He begs and entreats you to find that the great uncle was a man of such pure generous and liberal mind, that there was not a particle of value mixed up with it; because, if you will have the kindness to find that, the

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security is not worth a button. Now, there is something very inviting in that. The learned counsel pressed upon you last night, and he presses upon you to-day, in the expectation that there may be found, not one, or two, or three, but that all twelve of you will take pleasure in finding that it was a mere gift, in order that by your so finding the security may be worth nothing at all.

“Gentlemen, law is very well in its way: but I think a little common sense and plain dealing is a great deal better. What do *you* think of the matter? Are you of opinion that the note was signed by the testator, he knowing it to be what it was? And, are you of opinion that there was an understanding that it should not only remunerate past services, but that it should be a consideration for the continuation of those services to the end of his life? If that is your opinion, the plaintiff will be entitled to your verdict on all the issues. If it is not your opinion, then you will find the other way.”

The jury returned a verdict for the plaintiff on all the issues, damages 3823*l*.

Gray, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground “that the judge presiding at the trial misdirected the jury on the second issue, in telling them, that, if they were of opinion that the note was given in consideration of the previous services, as well as of services expected to be afterwards rendered, the plaintiff was entitled to the verdict on that issue; also, in not telling them that the plaintiff’s evidence proved the defendants’ case on that issue;” and also on the ground that the verdict on the second issue was against the weight of the evidence.

Whateley, *Keating*, and *Huddleston*, on a former day in this term, shewed cause. The note in question was

given for a perfectly good consideration, viz. services rendered and to be rendered by the plaintiff to his uncle. The whole case was fairly and properly left to the jury. [Crowder, J. What evidence is there of consideration of future services?] It was shewn that the plaintiff continued with the testator as his confidential clerk and adviser down to his death. It may fairly be assumed that the expectation of future services formed part of the inducement for the giving of the note. There can be no doubt that the old man intended to remunerate the nephew for, and that the note was given in consideration of, services which he had rendered and which the testator expected to receive from him. [Williams, J. Because of, not in consideration of services.] It is clear from the expression which fell from the testator at various times, that he did not intend that his nephew should go on working for him for nothing: and those expressions are equally referable to future as to past services. In *Edwards v. Jevons*, antè, Vol. VIII, p. 436, a guarantie was given in this form,—“In consideration of E. R. & Co. *giving credit* to D. J., I hereby engage to be responsible, and to pay any sum not exceeding 120*l.* due to the said E. R. & Co. by the said D. J. :” and it was held to be a good and binding guarantie; the words “giving credit” being equally applicable to *future* as to *past* credit. [Williams, J. The case of *Baxter v. Gray*, 4 Scott, N. R. 374, 3 M & G. 771, rather supports your view. There, the plaintiff, a surgeon, for several years bestowed surgical attendance upon a lady, but, expecting that she would amply compensate him by a legacy, sent in no bill. She died, and left him nothing; whereupon he sued her executors, claiming 500*l.* The jury awarded him 250*l.*: and the court refused to disturb the verdict,—holding, that, in such a case, to disentitle the party to sue, there must be something more than the mere *expectation* of a

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legacy. Tindal, C. J., said: "I take the law on the subject to have been correctly laid down by Lord Chief Justice Raymond, in *Osborn v. The Governors of Guy's Hospital*, 2 Stra. 728, where he tells the jury that they must consider how it was *understood by the parties* at the time of doing the business." And Erskine, J., added: "It appears from the evidence that the plaintiff forbore to assert his claim in the life-time of the testatrix, in the expectation that he would be better paid in the shape of a legacy. But, unless it is shewn that the plaintiff's services were rendered upon a distinct *understanding* that he was to receive no remuneration except what the testatrix might think fit to leave him by her will, there is no answer to the action. And that seems to have been the way in which the matter was presented to the jury." Might not the promissory note in this case be regarded as a testamentary document? Documents of this description have been admitted to probate.] Parol evidence would not be admissible to shew that it was intended as a testamentary document; for, that would be contradicting the contract appearing on the face of the instrument: *Woodbridge v. Spooner*, 3 B. & Ald. 233. In that case Bayley, J., said: "It appears on the face of the note to have been given for a sufficient consideration, and it could not have been the intention that the compensation should rest on the ground of a *donatio mortis causâ*, for, then it would be revocable, but that it should be secured by a binding instrument. Under these circumstances, the note was given: and it seems to me that it was obligatory on the party making it, and that, even if there were a secret understanding that the note should not be presented for payment until after the decease of the maker, still it would be binding on her executors. Besides, here the note on the face of it pur-

ports to be payable on demand, and it would be extremely dangerous to allow a party who has signed such an instrument, afterwards to say that it was not so payable. It is a general and useful rule, that no parol evidence is admissible to contradict that of which there is written evidence." [*Cresswell*, J. In that case, the court refused to admit evidence to be given to contradict the written statement, because contrary to the rules of the common law: but the Ecclesiastical court constantly allows evidence to be given contradictory to a written document. *Williams*, J. There is a late case in the Exchequer, of *Gough v. Findon*, 7 Exch. 48, where the subject was much considered. Among the papers of a testator were found two letters sealed and directed "For Sarah Gough, my late servant." Sarah Gough had been in the service of the testator as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money; and one of the letters stated that the testator inclosed 200*l.* as a mark of respect; and the other letter stated that the inclosed was for her long and faithful services: and it was held that the action was not maintainable by Sarah Gough upon the notes, which were in effect a legacy, and an informal one, not being duly attested as required by the 1 Vict. c. 26, and therefore void. Parke, B., there said: "The two notes in truth amounts to an informal legacy. The testator carefully inclosed them in sealed envelopes, and directed them to the plaintiff. It was clearly his intention that the notes should not be delivered to her until after his death." If the security is not to operate inter vivos, it is an evasion of the legacy duty, and a testamentary instrument.] There was no intention here to evade the legacy duty. In *Gough v. Findon*, the notes remained in the testator's posses-

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sion up to the time of his death. [*Williams, J.* You get rid of the objection last suggested, if you shew that the note might have been enforced in the life-time of the testator.] If Thomas Pye had been sued in his life-time upon this note, he clearly would have had no answer to the action. It is difficult to see how this case differs from that of *Baxter v. Gray*.

John Gray, Scotland, and Phipson, in support of the rule. The whole transaction was fraught with suspicion. There was no evidence that the testator knew what he did when he signed the note. That the plaintiff had rendered some services to his uncle, there was no doubt; but the question was, whether those services were rendered gratuitously, or under an implied contract that he was to be paid for them. If the latter, there would unquestionably be a good consideration for the giving of the note, to the extent of what those services were reasonably worth. There was no evidence, however, to justify the jury in coming to the conclusion that the plaintiff ever expected to be paid for his services, or that he could have sued the testator for them. There clearly was no sufficient consideration for the giving of the note: *Story on Bills*, § 184. [*Jervis, C. J.* The difficulty I feel, is, whether the Lord Chief Baron sufficiently explained to the jury what "consideration" means. (a) Nobody can doubt that the testator would never have given his nephew the promissory note, if there had not been services. It may be that those services made him more kindly disposed towards that one nephew in particular. *Cresswell, J.* Or his good will towards the plaintiff may have induced him to give a large sum

(a) See *Lampleigh v. Braithwait*, Hob. 105, and the notes to that case in 1 *Smith's Leading Cases*, 121—139.

for very inconsiderable services.] The jury were not, upon the whole, sufficiently instructed. The law clearly implies no promise, where there is no contract on the one side to render, or on the other to pay for, future services. The case of *Gough v. Findon*, 7 Exch. 48, presents an insuperable objection to the plaintiff's suing upon this note. [Williams, J. There, the note remained in the testator's possession till his death.] That makes no difference. [Jervis, C. J. This note was payable on demand: you cannot by parol contradict its terms.] In order to make the note a valid note payable on demand, it must have been given in consideration of past services which were to be paid for, or of future services to be performed by the plaintiff under a binding contract. The Lord Chief Baron ought to have told the jury that they must find the existence of one of those two considerations, to justify a verdict for the plaintiff. Was there any reasonable evidence of either? In *Baxter v. Gray*, the plaintiff had performed services upon an ordinary contract, to be paid for them as much as they were reasonably worth: and the argument on the part of the executors was, that, because he expected, or hoped for, a legacy from the patient, he was not entitled to be paid. That argument, however, was unsuccessful. The question here is, whether the services rendered by the plaintiff to the testator, were performed under circumstances and upon terms which would have enabled the former to maintain an action for work and labour against the latter in his life-time. Clearly they were not. The expression of the testator, "Will; thee shan't work for nothing;" plainly shewed the relative position of the parties, and that the testator intended to give the plaintiff something to which he had no claim in point of law. Suppose, immediately after the note was given, the plaintiff had

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sued upon it,—would not a plea, that the note was given in consideration of a contract by the plaintiff that he should continue his services at the colliery, and that the plaintiff had refused from the time of the giving of the note to perform services, afford a good answer to the action? [*Cresswell, J.* Or, could the testator have sued the plaintiff for refusing to perform the future services in consideration of which the note was given?] The attention of the jury was diverted from the real point upon which their verdict ought to turn. They could not have understood from it, that, so far as regarded the future services, to constitute a good consideration for the giving of the note, there must have been an obligation on the part of the plaintiff to render those services,—a contract, for the breach of which the testator might have sued him. [*Cresswell, J.* Assume that the consideration for the note was, a promise to perform future services,—would the fact of the plaintiff's quitting the service immediately after afford an answer to an action upon the note?] If it would, that does not displace the argument. There must still be the contract. The question which ought substantially to have been left to the jury, was, whether there was any evidence of a contract on the part of the plaintiff rendering it obligatory upon him to perform future services for the testator. That question was wholly withdrawn from them, and therefore the defendants are entitled to have the matter further investigated.

JERVIS, C. J. There certainly is some difficulty and doubt as to the way in which this case was presented to the jury, and therefore, before we decide, we will take a little time to read the note of the learned Chief Baron's summing up.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.

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We have looked into the notes of the summing up in this case, and, upon the whole, we think it would be more satisfactory if this case were submitted to another jury, with a more precise direction as to the sort of consideration necessary to sustain the plaintiff's claim upon the note in question. It is plain that it was taken for granted that the note was given by the testator to his nephew as a gratuity or reward for past services, and not in consideration of services to be rendered in future. But it was left to them to say whether there was an *understanding* between the parties not only that the note should be taken as a gift for what was past, but also as a remuneration to the plaintiff in respect of future services to be rendered by him as long as the old man should require them,—in which case, they were told, there would be a good consideration in point of law. The learned Chief Baron says,—“If you think that that arrangement was made with an understanding between the parties, not only that he should accept that as a gift for what was passed, but that it should be a remuneration to him in respect of future services to be rendered as long as the old man should require them,—then, if that is your opinion in point of fact, I am of opinion in point of law that was a good consideration. We think that was not the correct way of presenting the case to the jury. In order to make the future services a good consideration for the giving of the note, we think it was incumbent on the plaintiff to shew that there was some *contract* for future services, which might have been enforced by the giver of the note, if the recipient omitted to perform it. Now, there was nothing to shew that the plaintiff might not the moment after the note was given, have refused to give his services to the testator. Upon this ground, therefore, we are of opinion that the matter

(u) The matter was ultimately compromised.

END OF HILARY TERM.

REGULA GENERALIS.

EASTER TERM, 19 VICT. 1856.

Services of Pleadings, Notices, &c.

“ It is ordered, that, in lieu of rule 164 of the Practice Rules of Hilary Term, 1853, the following be substituted :—

“ Service of pleadings, notices, summons, orders, rules, and other proceedings, shall be made before 7 o'clock, P.M., except on Saturdays, when it shall be made before 2 o'clock, P.M. If made after 7 o'clock, P.M., on any day except Saturdays, the service shall be deemed as made on the following day ; and, if made after 2 o'clock, P.M., on Saturday, the service shall be deemed as made on the following Monday.

“ CAMPBELL.

“ JOHN JERVIS.

“ FRED. POLLOCK.

“ C. CRESSWELL.

“ W. ERLE.

“ CHARLES CROMPTON.

“ R. B. CROWDER.

“ J. WILLES.

“ E. H. ALDERSON.

“ SAMUEL MARTIN.

“ G. BRAMWELL.

“ *May 8th*, 1856.”



TABLE

OF

THE PRINCIPAL MATTERS.

ABANDONMENT.

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AFFIDAVITS.

I. *Of Jurymen as to what passes amongst them.*

Affidavits of jurymen, to the effect that they did not understand the answers given by their foreman to certain questions put to them, to amount to a finding for the plaintiff:—Held, inadmissible. *Raphael v. The Bank of England*, 161.

II. *On Motion for New Trial.*

Surprise.—Upon a motion for a new trial in an action of crim. con., on the ground of surprise, the court will re-

ceive the affidavit of the defendant, but not that of the plaintiff's wife. *Hawker v. Seale*, 595.

AGENT.

I. *Authority to receive Payment.*

A., as agent for B., sold wine to C., who paid for it by returning to A. his own cheque which C. had cashed for him a few days previously, and which it appeared had never been presented by C.:—Held, in the absence of any evidence of ratification by B.,—that this was not, as between him and C., a payment of C.'s debt, although the jury found that the transaction was bona fide. *Underwood v. Nicholls*, 239.

II. *Revocation of Authority.*

A. employed B., a clerical agent, to offer an advowson for sale, upon an understanding, that, in the event of a sale being effected through B.'s agency, the latter should receive a commission of 5 per cent. upon the amount of the purchase-money. A. afterwards, without communicating with B., sold the living himself. In an action charging a wrongful revocation of the authority,

—Held, that, in the absence of evidence of expense or liability incurred by B., he was not entitled to recover anything. *Simpson v. Lamb*, 603.

Quære, whether the *wrongful* revocation of the authority to sell was put in issue by “not guilty?” *Ib.*

And see PARLIAMENT, II.

ALTERATION.

See WARRANT OF ATTORNEY.

AMENDMENT,

I. *Of Indorsement on Process.*

The omission of the name of the maker of the note in the indorsement of a writ under the Bills of Exchange Act, 1855, is an irregularity; but the court will, upon a motion to set aside the copy and service, allow the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852, on payment of costs. *Knight v. Pocock*, 177.

II. *Of Rules.*

An issue went down for trial, when an arrangement was made between the parties (under a rule of court), but through inadvertence the plaintiff did not ask for the costs of the issue:—The court refused to allow the rule to be amended in this respect in a subsequent term. *Hayne v. Robertson*, 548.

III. *Of Award.*

An arbitrator, in making an award in favour of the defendant, by mistake called him “David,” instead of “Daniel.” The award having been sent back to him for amendment, he wrote

at the bottom of it the following certificate:—“In pursuance of a rule, &c. I do hereby certify that this my award ought to be amended by substituting the name Daniel P. for the name of David P., the name David P. having been inserted therein by mistake instead of Daniel P.:—Held, a sufficient amendment. *Davies v. Pratt*, 183.

APPEAL.

See COUNTY-COURT, I.

ARBITRAMENT.

I. *Certificate.*

Where a verdict is taken for the plaintiff for a given sum, subject to a reference to an arbitrator, who is to reduce it to such amount as he may think proper, and the arbitrator by a formal award directs the verdict to be reduced by a nominal sum, his determination, though in form an award, is in substance a certificate, and, consequently, the plaintiff is entitled to the expenses incurred before him, as costs in the cause. *Sim v. Edwards*, 527.

II. *Compulsory Reference under 17 & 18 Vict. c. 125, s. 3.*

Under the 3rd section of the Common Law Procedure Act, 1854, it is competent to a judge at Chambers to refer the whole matter in dispute, though some of the items of the account may be disputed. *Browne v. Emerson*, 361.

III. *Rectifying Mistake in Award.*

See AMENDMENT, III.

IV. *Order under 1 & 2 Vict. c. 110, s. 18.*

1. It is not competent to a party, in answer to a motion under the 1 & 2 Vict. c. 110, s. 18, to raise by affidavit any objection which does not appear upon the face of the award,—as, for instance, that the arbitrator (the action referred being for a libel, with a plea of not guilty, and a justification *as to part*;) has found for the plaintiff on the first issue (the finding on the second being for the defendant), but *without damages*. *Davies v. Pratt*, 183.

2. By an order of reference, a cause and all matters in difference were referred to a barrister, “but so as the reference hereby made be not proceeded with until the arbitrator hereby appointed shall have made and published his award in a certain action of *T. v. A.*, now pending in the court of Exchequer, and which action has been referred to the award of the said arbitrator:” Held, upon a motion under the 1 & 2 Vict. c. 110, s. 18,—that it was no answer to the rule, that the award omitted to state on the face of it, that, previously to proceeding with the reference, the arbitrator had made an award in *T. v. A.*; for that the court would presume that he did his duty. *Id.*

V. *Making Order a Rule of Court.*

Original Order lost.—An order of reference with the appointment of an umpire, and two enlargements of the time for making the award, indorsed thereon, having been accidentally destroyed,—the court (on payment of costs) allowed a duplicate of the order, together with *copies* of the indorsements on the original, verified by affidavit to the best of the deponent's

knowledge and belief, to be made a rule of court. *Parker v. Bach*, 512.

ASSENT.

See EXECUTION.

ASSIGNEE.

Of literary Work.—*See* DRAMATIC COPYRIGHT.

ATTACHMENT.

I. *Against a Witness for not attending on Subpœna.*

Upon a motion for an attachment against a witness for not attending pursuant to a subpœna, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to her husband a notice which had been left with her, requiring his attendance in court on the following morning, and the witness swearing that he did not receive the notice, and did not wilfully disobey the process of the court,—the rule was discharged, but without costs. *Netherwood v. Wilkinson*, 226.

II. *What a Debt attachable under 17 & 18 Vict. c. 125, s. 61.*

A superannuation allowance awarded by a resolution of the court of directors, pursuant to the 53 G. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a “debt” that is attachable under the 61st section of the Common Law Procedure Act, 1854. *Innes v. The East India Company*, 351.

AUTHOR.

Of literary Work.—*See* DRAMATIC COPYRIGHT.

AWARD.

See ARBITRAMENT.

BANK-NOTES.

Negotiability of: bonâ fide Holder.

1. One who takes a bank-note or other negotiable security bonâ fide,—that is, giving value for it, and having no notice at the time that the party from whom he takes it has no title,—is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself. *Raphael v. The Bank of England*, 161.

2. A money changer at Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, took one of the stolen notes (for 500*l.*) at Paris,—giving cash for it, less the current rate of exchange,—from a stranger, whom he merely required to produce his passport and write his name on the back of the note:—Held, that the circumstance of his forgetting or omitting to look for the notice was no evidence of mala fides. *Ib.*

BANKRUPT.

What passes to Assignees.

In consideration of certain periodical payments, A. agreed to build a ship for B., to be launched on or before the 31st of July, 1853. The agreement contained the following proviso,—“Provided always, and it is hereby expressly agreed between the said parties, their executors, &c., that, in case A. should fail to complete the said ship according to the covenants and stipulations hereinbefore contained to be performed on his part, then it shall be lawful for B.

to enter upon and take possession of the said ship or vessel (which from and after the payment of the first instalment shall be and be deemed and continue to be as soon as the said ship or vessel shall be commenced, in every respect and for every purpose, the property of B.), and to cause the works hereby agreed to be done to be completed by any person whom he shall see fit to employ therein,—using such of the materials of A. as should be applicable to the purpose,” &c.—A. to repay to B. so much as he should expend thereon in excess of the contract price.

A. having failed to complete the ship by the stipulated time, B. took possession of her, and (after an act of bankruptcy committed by A.) proceeded to finish her, using therein certain materials which were in the yard, and were suitable, but had not been specifically appropriated by A. to the ship. Some of these materials had been selected by B. before A.'s bankruptcy, and some were placed within the carcase of the ship, the remainder in a shed alongside: but none of them had actually been used by B. before A.'s bankruptcy:—

Held, that the assignees were entitled to recover against B. the whole value of these materials. *Baker v. Gray*, 462.

BENEFICE.

Exchange of,—See SIMONY.

BEQUEST.

Assent to,—See EXECUTORS.

BILL OF EXCHANGE.

I. Drawing of.

To a count on a bill, by drawer against acceptor, the defendant plead-

ed, for "a defence on equitable grounds," that the bill declared on, which purported to have been drawn on the 12th of July, 1855, ought to have been, and was represented by the plaintiff to be, drawn on the 25th of July, and that the action was commenced before the bill would have been due if properly dated:—The court set aside the plea, on the ground that it disclosed no equitable defence. *Drain v. Harvey*, 257.

II. Consideration.

1. In an action on a promissory note, by indorsee against maker, the defendant pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee to the plaintiff without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant:—The court granted a new trial, without examining whether the direction of the judge was right or wrong. *Wood v. Cox*, 280.

2. *Future Services*.]—To constitute the rendering of future services by the payee a good consideration for the making of a promissory note, there must be some binding contract for such services. *Hulse v. Hulse*, 711.

III. Proceeding under the 18 & 19 Vict. c. 67.

Amending defective Indorsement.]—The omission of the name of the maker of the note in the indorsement of a writ under the Bills of Exchange Act, 1855, is an irregularity; but the court will, upon a motion to set aside the copy and

service, allow the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852, on payment of costs. *Knight v. Pocock*, 177.

And see REGULE GENERALES, I.

CALLS.

Indemnity against,—See MINING SHARES.

CASE.

For Negligence.

1. A colt strayed from a field into a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train:—Held, that the company were responsible. *The Midland Railway Company, App., Daykin, Resp.*, 126.

2. A., a passenger by the M. railway from Gloucester to Bristol, on arriving at the terminus at Bristol, told a porter there that he wished to proceed by the B. and E. railway (whose station closely adjoined that of the M. railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the B. and E. station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended an incline to the departure platform of the B. and E. railway. There was no evidence that the portmanteau was ever afterwards seen; and it never reached Torquay.

In an action against the M. Railway Company for the loss,—Held, that there was no evidence of a breach of their contract to deliver either to A., or at the departure platform of the B. and E. railway. *The Midland Railway Company, App., Bromley, Resp.*, 372.

CERTIFICATE.

See ARBITRAMENT, I.

CHARGE.

See LANDS IMPROVEMENTS ACTS.

CHEQUE.

See PAYMENT.

CLERICAL AGENT.

See AGENT, II.

CLERK.

To Visiting Justices,—See LUNATIC ASYLUM.

COLLATERAL SECURITY.

See SHIPPING.

COMMISSION.

To examine Witnesses.

A commission was taken out by the defendant to examine a witness at Paris. At the trial, the plaintiff's counsel abandoned that part of his case to which the evidence under the commission applied, and the defendant had a verdict on that issue:—Held, that the defendant was entitled to the costs of the commission. *Jewell v. Parr*, 636.

COMMON LAW PROCEDURE ACT, 1852.

Indorsement of Process : amendment.

The omission of the name of the maker of the note in the indorsement of a writ under the Bills of Exchange Act, 1855, is an irregularity ; but the court will, upon a motion to set aside the copy and service, allow the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852, on payment of costs. *Knight v. Pocock*, 177.

COMMON LAW PROCEDURE ACT, 1854.

I. *Compulsory Reference under s. 3.*

Under the 3rd section of the 17 & 18 Vict. c. 125, it is competent to a judge at chambers to refer the whole matter in dispute, though some of the items of the account may be disputed. *Brown v. Emerson*, 361.

II. *Sufficiency of Stamp.*

Under s. 31 of the 17 & 18 Vict. c. 125, the question whether or not a document offered in evidence requires to be, or is sufficiently stamped, is to be decided by the judge at nisi prius, and cannot properly be reserved for the opinion of the court. *Siordet v. Kuczynski*, 251 ; *Tattersall, App. Fearnley, Resp.*, 368.

III. *Interrogatories under s. 31.*

1. It is no answer to an application for leave to deliver interrogatories to a defendant, under the 51st section of the 17 & 18 Vict. c. 125, that the answers to the proposed interrogatories might tend to a forfeiture of the party's estate ; the objection must be made to the particular questions after the party has been sworn, *Chester v. Wortley*, 410.

2. Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture. *Id.*

3. The court will allow interrogatories to be delivered by a plaintiff, under the 51st section of the Common Law Procedure Act, 1854, after the defendant has pleaded,—without a special affidavit. *James v. Barns*, 596.

IV. Attachment under s. 61.

A superannuation allowance awarded by a resolution of the court of directors, pursuant to the 53 G. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a "debt," that is attachable under the 61st section of 17 & 18 Vict. c. 125. *Innes v. The East India Company*, 351.

COMMITTEE OF VISITORS.

See LUNATIC ASYLUM.

COMPULSORY REFERENCE.

Under 17 & 18 Vict. c. 125, s. 3.

Under the 3rd section of the Common Law Procedure Act, 1854, it is competent to a judge at chambers to refer the whole matter in dispute, though some of the items of the account may be disputed. *Browne v. Emerson*, 361.

CONDITION.

Reasonableness of,—See ELECTRIC TELEGRAPH.

CONSIDERATION.

See BILL OF EXCHANGE, II.

CONTRACT.

I. Construction of.

1. By an agreement under seal,—reciting, amongst other things, that the plaintiff had erected a factory, &c., "for the purpose of carrying on the manufacture of patent-fuel, &c., and that the defendants had agreed to grant a lease of the land, &c.," to the plaintiff, and to enter into certain other arrangements "for the supply of coal for the said manufactory," and otherwise, on the terms therein mentioned,—it was agreed (amongst other things) that all the coals consumed by the plaintiff for the purpose of his manufacture during a certain term, should be purchased of the defendants, and that the defendants should not be compelled to supply more than 500 tons weekly.

In an action against the defendants for a breach of the implied contract to deliver 500 tons of coals weekly, the declaration averred that the plaintiff was at all times, &c., ready to receive that quantity, of which the defendants had notice, and required the defendants to deliver the same, and that "he had done all things on his part, and all things had happened, to entitle him to have the said 500 tons of coals in each week delivered to him," &c.:—Held, that the declaration was sufficient, although it contained no specific averment that the supply was required by the plaintiff for the purpose of the manufacture of patent-fuel. *Wood v. The Governor and Company of Copper Miners in England*, 561.

2. The defendants by their third plea alleged, that, before the accruing of the causes of action, and from thence hitherto, the plaintiff had wholly discontinued and abandoned the manufacture of the said fuel upon the terms of

the said agreement:—Held, a good plea, upon the assumption that it meant a *permanent* abandonment of the works, and not, as the plaintiff in his replication averred, a mere temporary suspension thereof in consequence of the defendants' failure to deliver the stipulated quantity of coal. *Id.*

3. The defendants further pleaded, —for a defence on equitable grounds, —that before the accruing of the causes of action in the declaration mentioned, and before the passing of The Governor and Company of Copper Miners Act, 1854 (14 & 15 Vict. c. cv,) to wit, on the 24th of January, 1848, an action was brought by the plaintiff against the defendants for certain alleged breaches of the said contract, which action was depending at the time of passing that act; that the cause and all matters in difference were refused to an arbitrator, who by the order of *nisi prius* and a subsequent rule of court was empowered to make two several awards, raising by the first points of law for the opinion of the court, and to assess damages upon the view the court might take, and who was also empowered "to order the determination of the contract, and the terms on which such determination should take place, neither of the parties to enforce payment of anything which might be found by the arbitrator to be due to him or them under the award so to be first made, until the arbitrator should have made and published his final award between the said parties. The plea then went on to allege, that the arbitrator made his first award, raising certain questions for the opinion of the court; that afterwards, and before the passing of the act, the court ordered judgment to be entered for the plaintiff; that no final award was ever made

by the arbitrator, and the reference was still pending; that, at and after the statement of the case by the arbitrator and before the passing of the act, the affairs of the defendants were in a state of insolvency, and that certain creditors of the defendants, with their concurrence, introduced into parliament a bill for settling their affairs, the passing of which bill was opposed by the plaintiff; that, whilst the bill was in committee, negotiations took place between the plaintiff and the promoters, which resulted in an agreement,—that the plaintiff should withdraw his opposition, that the contract between the plaintiff and the defendants should be determined by the arbitrator, who should assess the sum to be paid by the defendants as the value of the said contract, that the plaintiff should bring no further actions against the defendants upon the said contract, and that a clause approved by the plaintiff should be introduced into the said bill whereby it should be enacted that the plaintiff should be deemed and considered a creditor of the defendants within the meaning of the act for such sum as should be assessed by the arbitrator, and that until the arbitrator should have made his final award, the plaintiff should be deemed and considered a creditor of the defendants for 2272*l.* 2*s.*; that, in pursuance of the said agreement, and in order to give effect to the same, a clause approved of by the plaintiff was introduced into the said bill; that the defendants had always been ready and willing to give effect to the said agreement, and everything had been done entitling them to the performance and fulfilment of the same by the plaintiff; that the said bill was thrown out, and that, before the commencement of this suit, a bill

to a similar effect was introduced (which was afterwards passed); and that thereupon an agreement was entered into between the plaintiff and the defendants and the said other persons, with respect to the last-mentioned bill, and the said contract, and the determination thereof by the arbitrator, and the assessment of the sum to be paid to the plaintiff as the value of the said contract, and with respect to any actions being brought by the plaintiff upon the said contract, and with respect to the clause to be inserted in the said last-mentioned bill, to the like effect as the agreement thereinbefore mentioned, and that a clause (s. 12) was inserted in the said act accordingly. The plea then went on to aver, that the defendants had always acted in good faith and upon the terms of the last-mentioned agreement, and had always been and still were ready and willing to abide by the final award of the said arbitrator, and in all things to perform the agreement on their part, and that all things had been done and had happened entitling them to the performance and fulfilment of the same by the plaintiff, but that the plaintiff had refused to abide by the said agreement, and had brought this action in violation of the same; and that, after the passing of the said act, and before the commencement of this suit, the debts and claims in the said act in that behalf mentioned were duly converted into stock of the Copper Miners Company, in pursuance of the provisions of the said act, and that the plaintiff, as a creditor of the defendants for the said sum of 2272*l.* 2*s.* in the 12th section mentioned, applied for an allotment of stock in respect of the said sum, and had the same allotted to him by the

defendants, and had had the full benefit, use, and advantage of such allotment,—wherefore the defendants said that in equity the plaintiff was barred from bringing this action:—

Held, that this was not a good equitable plea, inasmuch as it disclosed no ground upon which a court of equity would grant a perpetual unqualified injunction to restrain the plaintiff from suing upon the contract. *Ib.*

4. Upon a sale (not by sample, and without warranty,) of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Wieler v. Schilizzi*, 619.

5. Thus, where A. bought of B. a cargo of Calcutta linseed, "tale quale,"—Held, that the contract was not satisfied by the delivery of linseed, though coming from Calcutta, which contained so large an admixture of other inferior seeds as to have lost its distinctive character of Calcutta linseed. *Ib.*

II. *Parol Evidence to explain.*

Parol evidence is admissible to shew that a written contract which has no date, was not intended to operate from its delivery, but from a future uncertain period. *Davis v. Jones*, 625.

III. *Evidence of Breach,—See RAILWAY COMPANY.*

IV. *By public Body,—See LUNATIC ASYLUM.*

And see SALE.

COPYRIGHT.

See DRAMATIC COPYRIGHT.

CORRUPT PRACTICES PREVENTION ACT, 1854.

I. *Personal Expenses.*

Personal expenses of the candidate,—such as hotel bills, railway fares, and the like,—are not within the 16th section of the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102. *Grant v. Guinness*, 190.

II. *Election Agent.*

The “agent for election expenses,” duly appointed under the 31st section, is not necessarily, without a further appointment, the agent to whom the bills are directed by s. 16 to be sent. *Ib.*

COSTS.

I. *Where Verdict taken subject to a Reference to reduce.*

Where a verdict is taken for the plaintiff for a given sum, subject to a reference to an arbitrator, who is to reduce it to such amount as he may think proper, and the arbitrator by a formal award directs the verdict to be reduced by a nominal sum, his determination, though in form an award, is in substance a certificate, and, consequently, the plaintiff is entitled to the expenses incurred before him, as costs in the cause. *Sim v. Edwards*, 527.

II. *Of Witnesses on particular Issues.*

1. A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed. The true question is, for what purpose were they called? *Jewell v. Parr*, 636.

2. A commission was taken out by the defendant to examine a witness at Paris. At the trial, the plaintiff's counsel abandoned that part of his case to which the evidence under the commission applied, and the defendant had a verdict on that issue:—Held, that the defendant was entitled to the costs of the commission. *Ib.*

III. *On Stay of Proceedings.*

Where a defendant takes out a summons to stay proceedings on payment of an admitted debt, which the plaintiff declines to receive, claiming more,—in order to disentitle the latter to the costs of the cause, the defendant must bring the money into court. *Hore v. Saxl*, 599.

IV. *Review of Taxation.*

The court will not grant a review of taxation upon a ground which was not specifically presented before the master. *Hore v. Saxl*, 599.

COUNTY COURT.

Appeal.

1. *Delivery of Paper-Books.*—Practice as to delivery of paper-books on appeals from county-courts. *Tattersall, App., Fearnley, Resp.*, 368.

2. *New Trial.*—It is not competent to a county-court judge, where he has once heard and disposed of an application for a new trial, to re-hear the case at a subsequent court. *The Great Northern Railway Company v. Mossop*, 130.

3. Where a county-court judge, in stating a case for the opinion of this court under the 13 & 14 Vict. c. 61, s. 14, sets out evidence which shews a total absence of foundation for the con-

clusion at which he has arrived,—the court will reverse his decision. *The British Industry Life Assurance Company*, App., Ward, Resp., 644.

CUSTOM.

As to cutting Trees and Poles,—See
LANDLORD AND TENANT.

DAMAGES.

Measure of, in Action for Breach of Contract.

1. In an action for the non-completion of a ship pursuant to a contract, the jury having given by way of damages the difference between the net freight which the vessel probably would have earned had she been ready at the time stipulated, and the amount actually earned by her when delivered some months later, when freights in the particular trade were lower,—no question having been raised at the trial as to the principle upon which the damages ought to have been assessed,—the court refused to disturb their verdict. *Fletcher v. Tayleur*, 21.

2. *Quare*, as to the proper mode of estimating damages for the breach of a contract for the delivery of a chattel? *Ib.*

DEMAND,

Particular of,—See PRACTICE.

DILAPIDATIONS.

See SIMONY.

DOCKS.

See HARBOURS.

DRAMATIC COPYRIGHT.

How assigned.

1. The proprietors of a theatre employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses. There was no contract in writing, nor any assignment or registry of the copyright; but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London:—Held, that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penalties under the 3 & 4 W. 4, c. 15, s. 2. *Shepherd v. Conquest*, 427.

2. Whether, under any circumstances, the copyright in a literary work, or the sole right of representation, can become vested ab initio in an employer other than the person who has actually composed or adapted a literary work,—*quare?* *Ib.*

3. Whether there can be a partial assignment of a copyright,—*quare?* *Ib.*

EAST INDIA COMPANY.

Civil Service Pension.

A superannuation allowance awarded by a resolution of the court of directors, pursuant to the 53 G. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a "debt" that is attachable under the 61st section of the Common Law Procedure Act, 1854. *Innes v. The East India Company*, 351.

ECCLESIASTICAL LAW.

1. In *quare impedit*, the ordinary cannot counterplead the patron's title to present, by setting up title in a third person; and he does so as much by

setting up a right in the Queen to present by lapse, as by any other title. *Storie v. The Bishop of Winchester*, 653.

2. Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 G. 3, c. 45, and 59 G. 3, c. 134,—the annual value of the two livings exceeding 1000*l.*—the parish church becomes, under the provisions of the 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void. *Ib.*

EJECTMENT.

Interrogatories.

Interrogatories, under the 17 & 18 Vict. c. 125, s. 51, may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture. *Chester v. Wortley*, 410.

ELECTION AGENT.

See PARLIAMENT, II.

ELECTION EXPENSES.

See PARLIAMENT, I.

ELECTRIC TELEGRAPH.

Construction of Company's Act.

The 66th section of the Electric Telegraph Company's Act, 1853,—16 & 17 Vict. c. ccciii.,—enacts, "that the use of any electric telegraph erected or formed under the provisions of the act for the purpose of receiving and sending messages shall, subject to the prior rights of use thereof for the service of Her Majesty and for the purposes of the company, and subject also to such reasonable regulations as may be from time to time made or entered into by the company, be open for the sending and receiving of messages by all persons alike without favour or preference."

The plaintiffs sent a message to the defendants' office, to be transmitted by their telegraph to a vessel lying off Exmouth, requiring the master to proceed with her to Hull. The message was received by the defendants, subject, amongst others, to the following condition,—“The company will not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they may arise.” In the transmission of the message (which was an unrepeatd one), “Southampton” was by mistake substituted for “Hull,” in consequence of which the vessel went to the former place, and the plaintiffs sustained loss in the sale of the cargo (oranges) at a bad market :—

Held, that the above condition was a reasonable one within the 66th section of the act, and afforded an answer to the action. *Mac Andrew v. The Electric Telegraph Company*, 3.

EVICITION.

See LANDLORD AND TENANT, II.

EVIDENCE.

I. Of Breach of Contract to deliver.

A., a passenger by the M. railway from Gloucester to Bristol, on arriving at the terminus at Bristol, told a porter there that he wished to proceed by the B. & E. railway (whose station closely adjoined that of the M. railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the B. & E. station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended an incline to the departure platform of the B. & E. railway. There was no evidence that the portmanteau was ever

afterwards seen; and it never reached Torquay.

In an action against the M. Railway Company for the loss:—Held, that there was no evidence of a breach of their contract to deliver either to A., or at the departure platform of the B. & E. railway. *The Midland Railway Company, App., Bromley, Resp.*, 372.

II. Parol Evidence to supply a Date.

Parol evidence is admissible to shew that a written contract which has no date, was not intended to operate from its delivery, but from a future uncertain period. *Davis v. Jones*, 625.

EXECUTORS.

Assent to Legacy.

It is competent to an executor to assent to a bequest, though he never prove the will, provided letters of administration with the will annexed be afterwards taken out. *Johnson v. Warwick*, 516.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

HARBOURS.

Harbours, Docks, and Piers Clauses Act, 10 & 11 Vict. c. 27, *Construction of*.

By the 71st section of the Ribble Navigation Act, 16 & 17 Vict. c. clxx, certain tolls are imposed in respect of goods "carried or conveyed in or upon the river Ribble," for every time of passing "the Ribble Sea Line," and "the Ribble Inner Line," respectively; and, by other clauses, a tonnage toll is also imposed on "vessels navigating the river Ribble," and a toll

for "the wharfage of goods landed, loaded, or placed in or upon the company's wharfs or warehouses." Subsequent clauses provide that the master of every vessel shall produce bills of lading, under a penalty; and that no vessel shall be cleared until the tolls are paid.

By the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27 (which is incorporated with the special act), s. 42, it is provided, that, if the goods are to be shipped, the rates or tolls shall be paid before the shipment; and by s. 45, the collector is empowered to distrain goods on board any vessel within the limits of the harbour, or any other goods on the premises of the undertakers, belonging to the person liable to pay such rates: and the interpretation clause, s. 3, provides that the word "owner," when used in relation to goods, shall include "any consignor, consignee, shipper, or agent for sale or custody of such goods, as well as the owner thereof:"—

Held, that one who delivers goods on board a vessel provided by the purchaser, is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st section of the special act. *The Ribble Navigation Company v. Hargreaves*, 385.

HUSBAND AND WIFE.

I. *Acknowledgment of Deed by the Wife.*

1. *Defective Certificate.*—The court allowed the certificate of an acknowledgment of a deed by a married woman, taken at Chippawa, in Upper Canada, under the 3 & 4 W. 4, c. 74, to be received and filed, although the affidavit of verification omitted to state the place where the acknowledgment was taken;

there being sufficient on the face of the documents to satisfy them that the commission had been bonâ fide executed beyond the seas. *In re Mary Partridge*, 18.

2. *Misdescription of Commissioner.*—A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners; but Jones signed the certificate and affidavit of verification "Edmund C. Jones." The court allowed the documents to be received and filed, upon the production of affidavits shewing that Edmund C. Jones was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the Company's service. *In re Price*, 708.

II. Conveyance by the Wife.

1. To warrant the court in making an order, under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property, on the ground of his being beyond seas,—it must be shewn that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country. *Squires, In re*, 176.

2. An order will not be granted where it appears that the husband is in correspondence with his wife, and remitting sums of money for her support, however small. *Ib.*

3. The court granted an order to

dispense with the concurrence of the husband in a conveyance by the wife of her separate property, under the 3 & 4 W. 4, c. 74, s. 91,—upon an affidavit shewing that he had absconded, and had not been heard of since the year 1837, although it also appeared that she had in the meantime married again. *In re Yarnall*, 189.

INDEMNITY

Against Calls.—See MINING SHARES.

INFANT.

Contract by.

A. sold goods to an infant, and delivered them to B. for the purpose of being worked up by him for the vendee. The vendee afterwards, and after a portion of the goods had been used in performance of the work, went with A. to B.'s shop, and desired that the remainder might be returned to A.: B. thereupon said, "I will return them or pay for them" at a price then agreed upon:—Held, that it was competent to A. thus to rescind the contract without writing; and that, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B. to object that the rescission was void, as not being for the infant's benefit. *Douglas v. Watson*, 685.

INSOLVENT DEBTOR.

Description of Creditor in Schedule.

An insolvent in his schedule described a debt as being due to "Messrs. Brown & Janson, bankers, 32, Cle-

ment's Lane, City:" the correct address of Brown & Janson was, No. 32, *Abchurch Lane*, and the notice of the hearing had been duly served at that place:—Held, that the description in the schedule was a sufficient compliance with the 1 & 2 Vict. c. 110, s. 69. *Brown v. Thompson*, 245.

INSURANCE.

Time Policy.

Sea-Worthiness.—To a declaration on a policy of insurance alleged to have been made on the 1st of May, 1852, "at and from the meridian of the day of sailing from Suez, to the meridian of the 20th of March, 1853,"—averring that afterwards the ship set sail and departed from Suez, and that the day of her so sailing from Suez was after the 20th of March, 1852, and before the 20th of March, 1853, and that, after the meridian of the said day of sailing from Suez, and before the meridian of the said 20th of March, 1853, the ship was by the perils of the seas wholly lost—the defendant pleaded, "that the said ship was not, at the time of sailing from Suez, or at any time on the day of sailing from Suez, or at any time afterwards during the continuance of the risk in the said policy of insurance mentioned, sea-worthy," &c.:—

Held,—on the authority of *Gibson v. Small*, 4 House of Lords Cases, 353,—that the plea was no answer to the action; the policy being in substance a time policy, and consequently there being no implied warranty that the vessel was sea-worthy on the day when the policy was intended to attach. *Michael v. Tredwin*, 551.

INTERROGATORIES.

Under 17 & 18 Vict. c. 125, s. 51.

1. It is no answer to an application for leave to deliver interrogatories to a defendant, under the 51st section of the Common Law Procedure Act, 1854, that the answers to the proposed interrogatories might tend to a forfeiture of the party's estate: the objection must be made to the particular questions, after the party has been sworn. *Chester v. Wortley*, 410.

2. Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture. *Ib.*

3. The court will allow interrogatories to be delivered by a plaintiff, under the 51st section of the Common Law Procedure Act, 1854, after the defendant has pleaded,—without a special affidavit. *James v. Barnes*, 596.

ISSUABLE PLEA.

See PLEADING, II.

ISSUE.

See AMENDMENT, II.

JOINT STOCK COMPANY.

Execution against a Shareholder.

To entitle a creditor who has obtained judgment against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder, under the 8 & 9 Vict. c. 16, s. 36, it must be shewn that the party against whom the application is made comes within the statutory definition of a shareholder, viz. one who has signed the deed of settlement: it is not enough to shew

that he has acted as a director of the company. *Moss v. The Steam Gondola Company*, 180.

JURY.

Affidavits of Jurymen.

Affidavits of jurymen, to the effect that they did not understand the answers given by their foreman to certain questions put to them, to amount to a finding for the plaintiff:—Held, inadmissible. *Raphael v. The Bank of England*, 161.

LANDLORD AND TENANT.

I. Terms of Holding.

A. held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H. Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood."

In an action against A., alleging for breach, amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit

for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew.

The judge having omitted to leave to the jury upon what terms Parsons had held the farm,—the Court granted a new trial. *Lord Hood v. Kendall*, 260.

II. Eviction, what amounts to.

A., demised, under separate leases, two separate tenements to B., with a covenant on the part of A. to insure the premises, and to re-build in the event of their destruction by fire. B. demised one of the tenements to C., and the other to D.; and during their respective tenancies the whole premises were destroyed by fire. The premises were afterwards re-built by A., pursuant to a new plan submitted to B., and approved of and signed by him. B., before the re-building, agreed to surrender the premises, and take a new lease of them in their altered state, which he afterwards did. The new buildings varied from the old ones, inasmuch as the area of C.'s premises was thereby decreased, and that of D.'s increased:—Held, that B. was not entitled to recover against C. and D., as for use and occupation, the rent accruing after the period at which the re-building had arrived at such a stage as permanently to alter the character of the respective premises,—the alter-

ations in the subject-matter of the demises amounting to an eviction, to which he was a party. *Upton v. Townend*; *Upton v. Greenlees*, 30.

LANDS IMPROVEMENT ACTS.
16 & 17 Vict. c. cliv., and 8 & 9 Vict. c. lxxxiv.

Construction of.

Where a part only of the land charged under the Lands Improvement Company's Acts, 1853 and 1855, is subject to a mortgage or other incumbrance, the charge executed under the authority of those acts has priority in respect of the *whole* amount of such charge over the mortgage or other incumbrance, until apportionment made by the inclosure commissioners under the 70th section of the first-mentioned act, so as to enable the person entitled to such charge to exercise his remedies under those acts as if no such mortgage or incumbrance existed. *The Lands Improvement Company v. Richmond*, 145.

LEGACY.

Assent to,—See EXECUTORS.

LUGGAGE.

See RAILWAY COMPANY, II.

LUNATIC ASYLUM.

Contract for building.

By the 17th section of the 8 & 9 Vict. c. 126, a select number of the justices for a county or borough, called the "committee of visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c.; and, by s. 16, they were

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enabled to sue and be sued in the name of their clerk:—Held, that an action might be maintained against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them,—although the plaintiff might have no means of enforcing his judgment when obtained. *Kendall v. King*, 483.

MINING SHARES.

Transfer of.

A. agreed to sell to B. 500 shares in a lead-mine, and a transfer paper in the usual form was made out in blank, signed by A., and sent to B., who kept it, but never signed his acceptance of the shares on the transfer paper, nor ever took it to the purser of the mine to get the transfer registered; and so the shares remained on the books of the company in A.'s name.

Calls having been afterwards made in respect of the shares, which A. was obliged to pay,—Held (upon the authority of *Humble v. Langston*, 7 M. & W. 517), that no contract was to be implied on the part of the buyer either to register the shares in his own name or to indemnify the seller against any calls which he might be required to pay by reason of non-registration. *Walker v. Bartlett*, 446.

MISTAKE.

See AMENDMENT, III.

ELECTRIC TELEGRAPH.

NEW TRIAL, II.

MORTGAGE.

See LANDS IMPROVEMENT ACTS.

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NAVIGATION ACT.

Construction of,—See RIBBLE NAVIGATION ACT.

NEGLIGENCE.

See CASE, I.

NEW TRIAL.

I. *Misdirection.*

1. In an action on a promissory note, by indorsee against maker, the defendant pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee to the plaintiff without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant:—The court granted a new trial, without examining whether the direction of the judge was right or wrong. *Wood v. Cox*, 280.

2. A. held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H. Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood."

In an action against A., alleging for breach, amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules

of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew.

The judge having omitted to leave to the jury upon what terms Parsons had held the farm—the Court granted a new trial. *Lord Hood v. Kendall*, 260.

And see *Hulse v. Hulse*, 711.

II. *Motion for.*

A rule for a new trial having, by mistake of counsel, been moved in the Queen's Bench instead of in this court,—the court permitted the motion to be renewed here after the expiration of the four days. *Johnson v. Warwick*, 516.

III. *Before Sheriff, Rule for.*

A rule for a new trial in a cause tried before the sheriff cannot in any case be drawn up unless there be an affidavit verifying the sheriff's notes, produced within the time allowed for moving. *Santé v. Hicks*, 523.

And see COUNTY COURT.

NOTES.

See NEW TRIAL, III.

ORDER.

For Payment of Money,—See ARBITRAMENT, IV.

OWNER.

See RIBBLE NAVIGATION ACT.

PAPER-BOOKS.

On County-Court Appeals.

Practice as to delivery of paper-books, on appeals from county-courts. *Tattersall, App., Fearnley, Resp., 368.*

PARLIAMENT.

Election Expenses.

1. Personal expenses of the candidate,—such as hotel bills, railway fares, and the like,—are not within the 16th section of the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102. *Grant v. Guinness, 190.*

2. The “agent for election expenses,” duly appointed under the 31st section, is not necessarily, without a further appointment, the agent to whom the bills are directed by s. 16 to be sent. *Ib.*

PARTICULARS OF DEMAND.

See PRACTICE.

PASSENGERS' LUGGAGE.

See RAILWAY COMPANY.

PAYMENT.

I. Authority of Agent to receive.

A., as agent for B., sold wine to C., who paid for it by returning to A. his own cheque, which C. had cashed for

him a few days previously, and which it appeared had never been presented by C.:—Held,—in the absence of any evidence of ratification by B.,—that this was not, as between him and C., a payment of C.'s debt, although the jury found that the transaction was *bonâ fide*. *Underwood v. Nicholls, 239.*

II. Plea of,—See PLEADING.

PENSION.

See EAST INDIA COMPANY.

PIERS.

See HARBOURS.

PLEADING.

I. Construction of Plea.

1. In an action by an incoming against an outgoing incumbent for dilapidations, the defendant pleaded an exchange of benefices between the plaintiff and himself “in their then state and condition,” with an agreement on the plaintiff's part not to call upon the defendant to pay for the repairs in the declaration mentioned. The plaintiff joined issue on this plea, and also demurred, and, a verdict having been found for him at the trial, the court upon a motion for judgment *non obstante veredicto*, held that the plea was good, inasmuch as it did not *necessarily* shew a simoniacal contract:—Held, that they were bound to put the same construction upon the plea when brought before them on the demurrer. *Goldham v. Edwards, 141.*

2. By an agreement under seal,—reciting, amongst other things, that the plaintiff had erected a factory, &c., for the purpose of carrying on the manufacture of patent fuel, &c., and that the

defendants had agreed to grant a lease of the land, &c., to the plaintiff, and to enter into certain other arrangements "for the supply of coal for the said manufactory," and otherwise, on the terms therein mentioned,—it was agreed (amongst other things) that all the coals consumed by the plaintiff *for the purpose of his manufacture* during a certain term, should be purchased of the defendants, and that the defendants should not be compelled to supply more than 500 tons weekly.

In an action against the defendants for a breach of the implied contract to deliver 500 tons of coals weekly, the declaration averred that the plaintiff was at all times, &c., ready to receive that quantity, of which the defendants had notice, and required the defendants to deliver the same, and that "he had done all things on his part, and all things had happened, to entitle him to have the said 500 tons of coals in each week delivered to him," &c.:—Held, that the declaration was sufficient, although it contained no specific averment that the supply was required by the plaintiff *for the purpose of the manufacture of patent-fuel*. *Wood v. The Copper Miners Company*, 561.

3. The defendants by their third plea alleged, that, before the accruing of the causes of action, and from thence hitherto, the plaintiff had wholly *discontinued and abandoned* the manufacture of the said fuel upon the terms of the said agreement:—Held, a good plea, upon the assumption that it meant a *permanent* abandonment of the works, and not, as the plaintiff in his replication averred, a mere temporary suspension thereof in consequence of the defendants' failure to deliver the stipulated quantity of coal. *Ib.*

II. *Issuable Pleas.*

By indenture between A. and B., it was covenanted that A. should at his own expense procure a suitable vessel, and stow on board thereof a certain sub-marine telegraphic cable which was then at Morden's Wharf, East Greenwich, and rig, fit, and provision the ship with all proper and sufficient masts, &c., and provide and pay competent officers, crew, and workmen for laying down the cable, &c., *and have the said ship fully equipped in all respects and ready for sea, at the Nore, on or before the 15th of July then next*, and would, as soon as the said ship should be ready for sea at the Nore as aforesaid, cause the same to proceed with the said cable on board to the Northern coast of Africa, and with all convenient despatch proceed to lay down the said cable: and B. covenanted to pay a certain sum on certain specified days, &c.

In an action by A. against B. for breach of the covenants contained in this indenture, the declaration contained specific averments of the performance, or readiness by A. to perform all the stipulations on his part, except the ship's being at the Nore ready for sea by the 15th of July; and it also contained a general averment of performance of all things on his part to be performed to entitle him to a performance of the covenants on the part of the defendant.

The defendant (being under terms to plead issuably) pleaded several pleas, traversing every material allegation in the declaration,—amongst others, sixthly, "that the plaintiff did not have such ship or vessel, &c., fully equipped in all respects according to the terms and conditions of the said indenture, and ready for sea, at the Nore, on or before

the 15th of July, 1855, according to the said indenture."

The plaintiff having signed judgment, on the ground that some of the pleas were not issuable,—the Court held that the sixth plea was clearly not an issuable plea; but some of the other pleas presenting a substantial defence, they set aside the judgment, upon terms. *Roberts v. Brett*, 534.

III. *Payment.*

To an action on a joint and several promissory note of the defendant and one S., payable to the plaintiffs at six months after date, the defendant pleaded,—amongst other pleas,—payment:—Held, that proof that the plaintiffs,—bankers, to whom the note had been given as security for the account of S.,—had funds to the credit of S. shortly after the bill became due, and had abstained from applying those funds in discharge of the note, or from communicating to the defendant for three years the fact that the note remained unpaid,—did not sustain the plea. *Strong v. Foster*, 201.

IV. *Equitable Defence.*

1. To an action on a joint and several promissory note of the defendant and one S., payable to the plaintiffs, at six months after date, the defendant pleaded (amongst other pleas), by way of equitable defence, that he made the note at the request and as surety for S., to secure a debt due from S. to the plaintiffs (a banking company), and without value; that the plaintiffs took the note from the defendant as surety only; that the plaintiffs, whilst holders of the note, without the knowledge or consent of the defendant, for a good and valuable consideration, gave S. time for

payment of the note, and forbore to enforce payment thereof; that they could and might and ought to have obtained payment from S. had they required it, and not given him time for the payment; and that the defendant had been and was by means of the premises damnified:—Held, that proofs that the plaintiffs had funds to the credit of S. shortly after the bill became due, and had abstained from applying those funds in discharge of the note, or from communicating to the defendant for three years the fact that the note remained unpaid,—did not sustain the "equitable defence." *Strong v. Foster*, 201.

2. To a count on a bill, by drawer against acceptor, the defendant pleaded for "a defence on equitable grounds," that the bill declared on, which purported to have been drawn on the 12th of July, 1855, ought to have been, and was represented by the plaintiff to be, drawn on the 25th of July, and that the action was commenced before the bill would have been due if properly dated:—The Court set aside the plea, on the ground that it disclosed no equitable defence. *Drain v. Harvey*, 257.

3. By an agreement under seal,—reciting, amongst other things, that the plaintiff had erected a factory, &c., for the purpose of carrying on the manufacture of patent fuel, &c., and that the defendants had agreed to grant a lease of the land, &c., to the plaintiff, and to enter into certain other arrangements "for the supply of coal for the said manufactory," and otherwise, on the terms therein mentioned,—it was agreed (amongst other things) that all the coals consumed by the plaintiff for the purpose of his manufacture during a certain term, should be purchased of

the defendants, and that the defendants should not be compelled to supply more than 500 tons weekly.

In an action against the defendants for a breach of the implied contract to deliver 500 tons of coals weekly, the declaration averred that the plaintiff was at all times, &c., ready to receive that quantity, of which the defendants had notice, and required the defendants to deliver the same, and that "he had done all things on his part, and all things had happened, to entitle him to have the said 500 tons of coals in each week delivered to him," &c.

The defendants pleaded,—for a defence on equitable grounds,—that, before the accruing of the causes of action in the declaration mentioned, and before the passing of The Governor and Company of Copper Miners Act, 1854 (14 & 15 Vict. c. cv,) to wit, on the 24th of January, 1848, an action was brought by the plaintiff against the defendants for certain alleged breaches of the said contract, which action was depending at the time of passing that act; that the cause and all matters in difference were referred to an arbitrator, who by the order of nisi prius and a subsequent rule of court was empowered to make two several awards, raising by the first points of law for the opinion of the court, and to assess damages upon the view the court might take, and who was also empowered "to order the determination of the contract, and the terms on which such determination should take place," neither of the parties to enforce payment of anything which might be found by the arbitrator to be due to him or them under the award so to be first made, until the arbitrator should have made and published his final award between the said parties. The plea then went on

to allege, that the arbitrator made his first award, raising certain questions for the opinion of the court; that afterwards, and before the passing of the act, the court ordered judgment to be entered for the plaintiff; that no final award was ever made by the arbitrator, and the reference was still pending; that, at and after the statement of the case by the arbitrator, and before the passing of the act, the affairs of the defendants were in a state of insolvency, and that certain creditors of the defendants, with their concurrence, introduced into parliament a bill for settling their affairs, the passing of which bill was opposed by the plaintiff; that, whilst the bill was in committee, negotiations took place between the plaintiff and the promoters, which resulted in an agreement,—that the plaintiff should withdraw his opposition, that the contract between the plaintiff and the defendants should be determined by the arbitrator, who should assess the sum to be paid by the defendants as the value of the said contract, that the plaintiff should bring no further actions against the defendants upon the said contract, and that a clause approved by the plaintiff should be introduced into the said bill, whereby it should be enacted that the plaintiff should be deemed and considered a creditor of the defendants within the meaning of the act for such sum as should be assessed by the arbitrator, and that until the arbitrator should have made his final award the plaintiff should be deemed and considered a creditor of the defendants for 2272*l.* 2*s.*; that, in pursuance of the said agreement, and in order to give effect to the same, a clause approved of by the plaintiff was introduced into the said bill; that the defendants had always been

ready and willing to give effect to the said agreement, and everything had been done entitling them to the performance and fulfilment of the same by the plaintiff; that the said bill was thrown out, and that, before the commencement of this suit, a bill to a similar effect was introduced (which was afterwards passed); and that thereupon an agreement was entered into between the plaintiff and defendants and the said other persons, with respect to the last-mentioned bill, and the said contract, and the determination thereof by the arbitrator, and the assessment of the sum to be paid to the plaintiff as the value of the said contract, and with respect to any actions being brought by the plaintiff upon the said contract, and with respect to the clause to be inserted in the said last-mentioned bill, to the like effect as the agreement thereinbefore mentioned, and that a clause (s. 12) was inserted in the said act accordingly. The plea then went on to aver, that the defendants had always acted in good faith and upon the terms of the last-mentioned agreement, and had always been and still were ready and willing to abide by the final award of the said arbitrator, and in all things to perform the agreement on their part, and that all things had been done and had happened entitling them to the performance and fulfilment of the same by the plaintiff, but that the plaintiff had refused to abide by the said agreement, and had brought this action in violation of the same; and that, after the passing of the said act, and before the commencement of this suit, the debts and claims in the said act in that behalf mentioned were duly converted into stock of the Copper Miners Company, in pursuance of the provisions of the said act, and that the plaintiff, as a

creditor of the defendants for the said sum of 2272*l.* 2*s.* in the 12th section mentioned, applied for an allotment of stock in respect of the said sum, and had the same allotted to him by the defendants, and had had the full benefit, use, and advantage of such allotment,—wherefore the defendants said that in equity the plaintiff was barred from bringing this action:—

Held, that this was not a good equitable plea, inasmuch as it disclosed no ground upon which a court of equity would grant a perpetual unqualified injunction to restrain the plaintiff from suing upon the contract. *Wood v. The Copper Miners Company*, 561.

PRACTICE.

I. Process.

Amendment of Indorsement on.—The omission of the name of the maker of the note in the indorsement of a writ under the Bills of Exchange Act, 1855, is an irregularity; but the court will, upon a motion to set aside the copy and service, allow the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852, on payment of costs. *Knight v. Pocock*, 177.

II. Particulars of Demand.

The indorsement on a writ of summons was as follows—"The following are the particulars of the plaintiff's claim,—500*l.* for principal money due upon a warrant of attorney executed by the defendant E. S.'s wife (before her marriage with him), bearing date the 27th of February, 1855. Interest thereon at the rate of 5*l.* per cent. per annum from the said 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek

to recover the same sum of 500*l.* upon an account stated between the plaintiff and the said E. S.'s wife before her marriage."

Upon a judge's order for a further or better account, with dates and items, of the particulars of the plaintiff's demand, the following was delivered,— "1855. February 25th. Amount due to the plaintiff upon an account stated on this date between the plaintiff and the defendant E. G. before her marriage, 500*l.* Above are the further and better particulars of the plaintiff's demand in this action, delivered in pursuance of the order of Cresswell, J.," &c. :—

Held, no compliance with the order. *Bayntun v. Satchell*, 383.

III. Amending Rule.

An issue went down for trial, when an arrangement was made between the parties (under a rule of court), but through inadvertence the plaintiff did not ask for the costs of the issue :—The court refused to allow the rule to be amended in this respect in a subsequent term. *Hayne v. Robertson*, 548.

IV. Second Application.

The court will not entertain a second application upon grounds which might and ought to have been brought forward upon the former occasion. *Leggo v. Young*, 549.

V. Interrogatories under 17 & 18 Vict. c. 125, s. 51.

1. It is no answer to an application for leave to deliver interrogatories to a defendant, under the 51st section of the Common Law Procedure Act, 1854, that the answers to the proposed inter-

rogatories might tend to a forfeiture of the party's estate : the objection must be made to the particular questions, after the party has been sworn. *Chester v. Wortley*, 410.

2. Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture. *Ib.*

VI. Staying Proceedings.

1. The court has no power to stay the proceedings in a second action of trespass, until the plaintiff has paid the costs of a former action for the same trespass, in which he had failed by reason of the want of a notice of action. *Danvers v. Morgan*, 530.

2. *Semble*, that the rule as to staying proceedings till former costs are paid, is confined to ejectments. *Ib.*

3. Where a defendant takes out a summons to stay proceedings on payment of an admitted debt, which the plaintiff declines to receive, claiming more,—in order to disentitle the latter to the costs of the cause, the defendant must bring the money into court, *Hore v. Saxl*, 599.

VII. Withdrawing the Record.

Upon a writ of trial before the undersheriff, the "record" may be withdrawn. *Shaw v. Owen*, 524.

VIII. New Trial.

See NEW TRIAL.

PRINCIPAL AND SURETY.

Surety, how discharged.

To an action on a joint and several promissory note of the defendant and one S., payable to the plaintiffs at six

months after date, the defendant pleaded,—secondly, payment,—thirdly, by way of equitable defence, that he made the note at the request and as surety for S., to secure a debt due from S. to the plaintiffs (a banking company), and without value; that the plaintiffs took the note from the defendant as surety only; that the plaintiffs, whilst holders of the note, without the knowledge or consent of the defendant for a good and valuable consideration, gave S. time for payment of the note and forbore to enforce payment thereof; that they could and might and ought to have obtained payment from S. had they required it, and not given him time for the payment; and that the defendant had been and was by means of the premises damnified:—

Held, that proof that the plaintiffs had funds to the credit of the principal debtor shortly after the bill became due, and had abstained from applying those funds in discharge of the note, or from communicating to the defendant for three years the fact that the note remained unpaid,—did not sustain either the plea of payment, or the equitable defence set up by the third plea. *Strong v. Foster*, 201.

PRIOR CHARGE.

See LANDS IMPROVEMENT ACTS.

PROCESS.

See PRACTICE, I.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROPRIETOR.

Of *Literary Works*,—See DRAMATIC COPYRIGHT.

PUBLIC BODY.

See LUNATIC ASYLUM.

QUARE IMPEDIT.

1. In quare impedit, the ordinary cannot counterplead the patron's title to present, by setting up title in a third person; and he does so as much by setting up a right in the Queen to present by lapse, as by any other title. *Storie v. The Bishop of Winchester*, 653.

2. Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 G. 3, c. 45, and 59 G. 3, c. 134,—the annual value of the two livings exceeding 1000*l.*,—the parish church becomes under the provision of the 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void. *Ib.*

RAILWAY COMPANY.

I. *Negligence.*

A colt strayed from a field on to a public road abutting upon which was a yard not fenced from a railway, the gate of which was through the neglect of the company's servants left open. Whilst the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train:—Held, that the company were responsible. *The Midland Railway Company, App., Daykin, Resp.*, 126.

II. *Loss of Passenger's Luggage.*

A., a passenger by the M. railway from Gloucester to Bristol, on arriving at the terminus at Bristol, told a porter

there that he wished to proceed by the B. & E. railway (whose station closely adjoined that of the M. railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the B. & E. station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended an incline to the departure platform of the B. & E. railway. There was no evidence that the portmanteau was ever afterwards seen; and it never reached Torquay.

In an action against the M. Railway Company for the loss:—Held, that there was no evidence of a breach of their contract to deliver either to A., or at the departure platform of the B. & E. railway. *The Midland Railway Company, App., Bromley, Resp.*, 372.

RECORD.

Withdrawal of.

Upon a writ of trial before the under-sheriff the "record" may be withdrawn. *Shaw v. Owen*, 524.

REFERENCE.

See ARBITRAMENT.

REGULÆ GENERALES.

I. *Bills of Exchange Act*, 1855.

1. Indorsements on writs under the "Bills of Exchange Act, 1855," 1.
2. Costs thereon, 3.

II. *Service of Pleadings, Notices, &c.*

It is ordered, that, in lieu of rule 164 of the Practice rules of Hilary Term, 1853, the following be substituted:—

"Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be made before 7 o'clock,

p.m., except on Saturdays, when it shall be made before 2 o'clock, p.m. If made after 7 o'clock, p.m., on any day except Saturdays, the service shall be deemed as made on the following day; and, if made after 2 o'clock, p.m., on Saturday, the service shall be deemed as made on the following Monday." Reg. Gen., *E. T.* 19 *Vict.*, 727.

REVOCATION.

Of Authority of Agent,—*See* AGENT, II.

RIBBLE NAVIGATION ACT.

Construction of.

By the 71st section of the Ribble Navigation Act, 16 & 17 *Vict.* c. clxx, certain tolls are imposed in respect of goods "carried or conveyed in or upon the river Ribble," for every time of passing "the Ribble Sea Line," and "the Ribble Inner Line," respectively; and, by other clauses, a tonnage toll is also imposed on "vessels navigating the river Ribble," and a toll for the "wharfage of goods landed, loaded, or placed in or upon the company's wharfs or warehouses." Subsequent clauses provide that the master of every vessel shall produce bills of lading, under a penalty; and that no vessel shall be cleared until the tolls are paid.

By the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 *Vict.* c. 27, which is incorporated with the special act, s. 42, it is provided, that, if the goods are to be shipped, the rates or tolls shall be paid before the shipment; and by s. 45, the collector is empowered to distrain goods on board any vessel within the limits of the harbour, or any other goods on the premises of the undertakers, belonging to the person liable to pay such rates: and the interpretation clause, s. 3, provides that the

word "owner," when used in relation to goods, shall include "any consignor, consignee, *shipper*, or agent for sale or custody of such goods, as well as the owner thereof: "—

Held, that one who delivers goods on board a vessel provided by the purchaser, is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st section of the special act. *Ribble Navigation Company v. Hargreaves*, 385.

RULE.

The court will not entertain a second application upon grounds which might and ought to have been brought forwards upon the former occasion. *Leggo v. Young*, 549.

SALE.

I. Of Goods.

1. Upon a sale (not by sample, and without warranty,) of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Wieler v. Schillizzi*, 619.

2. Thus, where A. bought of B. a cargo of "Calcutta linseed, tale quale,"—Held, that the contract was not satisfied by the delivery of linseed, though coming from Calcutta, which contained so large an admixture of other inferior seeds as to have lost its distinctive character of Calcutta linseed. *Ib.*

3. *Construction of Sale Note.*—A., having a quantity of rape-oil at Humphrey's wharf, contracted to sell five

tons thereof to B. The bought note was as follows:—"Bought for account of B., of Mr. A., five tons of first quality foreign refined rape-oil, at 53s. per cwt.; usual allowances: *to be free delivered and paid for in fourteen days* in cash less 2½ per cent. discount."

A. sent an order to the wharf directing the wharfinger to transfer into B.'s name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer order to B.'s counting-house, and offered them to him, at the same time demanding a cheque for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered.

In trover by A. against B. for the oil and the transfer order,—Held, that, under the circumstances, neither the property nor the right to the possession thereof passed to B. *Godts v. Rose*, 229.

4. *Semble*, that, upon the true construction of the order, the seller was not bound to deliver the oil without payment of the price; but that, at all events, the defendant's counsel having, on cross-examination of one of the plaintiff's witnesses, elicited from him that that was the understanding of such contracts in the particular trade, the defendant was bound by it. *Ib.*

SERVICE.

See BILL OF EXCHANGE.

SHAREHOLDER.

Execution against a Shareholder.

To entitle a creditor who has obtained judgment against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder, under the 8 & 9 Vict. c. 16, s. 36, it must be shewn that the party against whom the application is made comes within the statutory definition of a shareholder, viz. one who has signed the deed of settlement: it is not enough to shew that he has acted as a director of the company. *Moss v. The Steam Gondola Company*, 180.

SHARES.

See MINING SHARES.

SHERIFF'S NOTES.

On Motion for New Trial.

A rule for a new trial in a cause tried before the sheriff cannot in any case be drawn up unless there be an affidavit verifying the sheriff's notes, produced within the time allowed for moving. *Santé v. Hicks*, 523.

SHIPPER.

See RIBBLE NAVIGATION ACT.

SHIPPING.

I. Evidence of Ownership.

1. The register is no evidence of ownership, so as to fix the party whose name appears thereon for contracts entered into on behalf of the ship by the master. *Myers v. Willis*, 77.

2. A. advanced money to the owner of a vessel at sea, receiving from him by way of security a bill of sale of the

ship, accompanied by a letter as follows:—"You have this day (August 1st, 1851) given me your acceptance for 1000*l.* against the inward freight of my barque the Celt, which vessel I am expecting will load home from the Pacific; and it is understood she is to be consigned to you inwards on arrival, and you are to reimburse yourself from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due repayment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me." A. registered the bill of sale on the 2nd of August, 1851:—

Held, upon a special case in which it was agreed that the court should draw such inferences of fact as a jury might draw,—that the register was per se no evidence of ownership, but that the court might look at all the circumstances, to see whether it was the intention of the parties, at the time of giving the bill of sale, that A. should become the absolute owner of the ship, so as to be liable for contracts entered into by the captain for the benefit of the ship, or whether he was to take her merely as security for his advance. *Ib.*

3. The mere fact of a man's being registered as a part-owner of a ship does not give his co-owner, or the captain, or the brokers, authority to pledge his credit for necessary repairs. *Brodie v. Howard*, 109.

4. The mere fact of a man's being registered as a part-owner of a ship, under an absolute bill of sale, which is shewn aliunde to have been given only as a security for advances, does not give his co-owner, or the master (ap-

pointed by his co-owner,) authority to pledge his credit for necessary repairs. *Hackwood v. Lyall*, 124.

II. *Contract for Building.*

In consideration of certain periodical payments, A. agreed to build a ship for B., to be launched on or before the 31st of July, 1853. The agreement contained the following proviso,—“Provided always, and it is hereby expressly agreed between the said parties, their executors, &c., that, in case A. should fail to complete the said ship according to the covenants and stipulations hereinbefore contained to be performed on his part, then it shall be lawful for B. to enter upon and take possession of the said ship or vessel (which from and after the payment of the first instalment shall be and be deemed and continue to be as soon as the said ship or vessel shall be commenced, in every respect and for every purpose, the property of B.), and to cause the works hereby agreed to be done to be completed by any person whom he shall see fit to employ therein,—*using such of the materials of A. as should be applicable to the purpose,*” &c.,—A. to repay to B. so much as he should expend thereon in excess of the contract price.

A. having failed to complete the ship by the stipulated time, B. took possession of her, and (after an act of bankruptcy committed by A.) proceeded to finish her, using therein certain materials which were in the yard, and were suitable, but had not been specifically appropriated by A. to the ship. Some of these materials had been selected by B. before A.'s bankruptcy, and some were placed within the carcase of the ship, the remainder in a shed alongside:

but none of them had actually been used by B. before A.'s bankruptcy:—

Held, that the assignees were entitled to recover against B. the whole value of these materials. *Baker v. Gray*, 462.

SIMONY.

1. In an action by an incoming against an outgoing incumbent for dilapidations, the defendant pleaded an exchange of benefices between the plaintiff and himself “in their then state and condition,” with an agreement on the plaintiff's part not to call upon the defendant to pay for the repairs in the declaration mentioned. The plaintiff joined issue on this plea, and also demurred, and, a verdict having been found for him at the trial, the court upon a motion for judgment non obstante veredicto, held that the plea was good, inasmuch as it did not *necessarily* shew a simoniacal contract:—

Held, that, they were bound to put the same construction upon the plea when brought before them on the demurrer. *Goldham v. Edwards*, 141.

2. The defendant further pleaded, that, before the breach of duty alleged in the declaration, the plaintiff, otherwise than by the agreement in the foregoing plea mentioned, and not by deed, wholly and absolutely absolved, exonerated, and discharged the defendant from payment for the dilapidations:—Held, a bad plea. *Id.*

STAMP.

Sufficiency of.

17 & 18 Vict. c. 125, s. 31.]—Under s. 31 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the question whether or not a document offered in evidence is sufficiently

stamped, is to be decided by the judge at nisi prius, and cannot properly be reserved for the opinion of the court. *Siordet v. Kuczynski*, 251.

STATUTE OF FRAUDS.

Construction of section 17.

1. *Acceptance.*]—A. sold a piano-forte to B. for 15*l.* 10*s.*, and delivered it at B.'s shop. B. kept it, but refused to pay for it, alleging that it was delivered upon an agreement that it should remain as security for the payment of certain outstanding bills which he had discounted for A. In an action for the price of the piano-forte,—Held, that there was a sufficient "acceptance" within the 17th section of the statute of frauds, and that parol evidence was admissible to shew the *terms* of the bargain. *Tomkinson v. Staight*, 698.

2. *Rescission of Contract.*]—A. sold goods to an infant, and delivered them to B. for the purpose of being worked up by him for the vendee. The vendee afterwards, and after a portion of the goods had been used in performance of the work, went with A. to B.'s shop, and desired that the remainder might be returned to A. B. thereupon said, "I will return them or pay for them" at a price then agreed upon:—Held, that it was competent to A. thus to rescind the contract without writing; and that, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B. to object that the rescission was void, as not being for the infant's benefit. *Douglas v. Watson*, 685.

STAYING PROCEEDINGS.

I. On Summons.

Where a defendant takes out a sum-

mons to stay proceedings on payment of an admitted debt, which the plaintiff declines to receive, claiming more,—in order to disentitle the latter to the costs of the cause, the defendant must bring the money into court. *Hore v. Szal*, 599.

II. Second Action for same Cause.

The court has no power to stay the proceedings in a second action of trespass, until the plaintiff has paid the costs of a former action for the same trespass, in which he had failed by reason of the want of a notice of action. *Danvers v. Morgan*, 530.

Semble, that the rule as to staying proceedings till former costs are paid, is confined to ejectments. *Id.*

SUPERANNUATION ALLOWANCE.

East India Civil Service Pension.

A superannuation allowance awarded by a resolution of the court of directors, pursuant to the 53 G. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a "debt" that is attachable under the 61st section of the Common Law Procedure Act, 1854. *Innes v. The East India Company*, 351.

SURETY.

See PRINCIPAL AND SURETY.

SUSPENSION.

See CONTRACT, I. 2.

TELEGRAPH.

See ELECTRIC TELEGRAPH.

TIMBER.

User as to cutting.

A. held a farm as tenant from year to year, upon a written agreement by which it was stipulated, amongst other things, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as H. Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events according to the rules of good husbandry used and accustomed in the neighbourhood."

In an action against A., alleging for breach, amongst others, the cutting and carrying away of ash-poles,—such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood,—it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew.

The judge having omitted to leave to the jury upon what terms Parsons had held the farm,—the Court granted a new trial. *Hood (Lord) v. Kendall*, 260.

TOLLS.

By the 71st section of the Ribble Navigation Act, 16 & 17 Vict. c. clxx, certain tolls are imposed in respect of goods "carried or conveyed in or upon the river Ribble," for every time of passing "the Ribble Sea Line," and "the Ribble Inner Line," respectively; and, by other clauses, a tonnage toll is also imposed on "vessels navigating the river Ribble," and a toll for the "wharfage of goods landed, loaded, or placed in or upon the company's wharfs or warehouses." Subsequent clauses provide that the master of every vessel shall produce bills of lading, under a penalty; and that no vessel shall be cleared until the tolls are paid.

By the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27 (which is incorporated with the special act), s. 42, it is provided, that, if the goods are to be shipped, the rates or tolls shall be paid before the shipment; and by s. 45, the collector is empowered to distrain goods on board any vessel within the limits of the harbour, or any other goods on the premises of the undertakers, belonging to the person liable to pay such rates: and the interpretation clause, s. 3, provides that the word "owner," when used in relation to goods, shall include "any consignor, consignee, *shipper*, or agent for sale or custody of such goods, as well as the owner thereof:"—

Held, that one who delivers goods on

board a vessel provided by the purchaser, is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st section of the special act. *The Ribble Navigation Company v. Hargreaves*, 385.

TRANSFER.

See MINING SHARES.

TROVER.

A. having a quantity of rape-oil at Humphrey's wharf, contracted to sell five tons thereof to B. The bought note was as follows:—"Bought for account of B., of Mr. A., five tons of first quality foreign refined rape-oil, at 53s. per cwt.; usual allowances: *to be free delivered and paid for in fourteen days* in cash less 2½ per cent. discount."

A. sent an order to the wharf directing the wharfinger to transfer into B.'s name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer order to B.'s counting-house, and offered them to him, at the same time demanding a cheque for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered.

In trover by A. against B. for the oil and the transfer order,—Held, that, under the circumstances, neither the

property nor the right to the possession thereof passed to B. *Godts v. Rose*, 229.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

VENDOR AND PURCHASER.

Measure of Damages on Vendor's Failure to make a Title.

1. Where a vendor fails to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor) is not entitled to damages for the loss of his bargain.

2. A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, and C. refusing to confirm it, B. brought an action against A. for the breach of contract:—Held, that he was only entitled to recover nominal damages and the expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavours to substitute a new contract on the failure of the original bargain. *Pounsett v. Fuller*, 660.

VISITORS.

See LUNATIC ASYLUM.

WARRANT OF ATTORNEY.

Alteration in, after Execution.

Filling in the date of a warrant of attorney after execution, is not such an

alteration as will avoid the instrument.
Keane v. Smallbone, 179.

WITHDRAWING RECORD.

See WRIT OF TRIAL.

WITNESS.

Attachment against.

Upon a motion for an attachment against a witness for not attending pursuant to a subpoena, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to

her husband a notice which had been left with her, requiring his attendance in court on the following morning, and the witness swearing that he did not receive the notice, and did not wilfully disobey the process of the court,—the rule was discharged, but without costs. *Netherwood v. Wilkinson*, 226.

WRIT OF TRIAL.

Upon a writ of trial before the undersheriff, the "record" may be withdrawn. *Shaw v. Owen*, 524.



I N D E X

TO THE

REGISTRATION APPEALS.

- I. *Cases decided upon Statutes anterior to the REFORM ACT, 2 W. 4, c. 45.*
- II. *Cases decided upon the Construction of the REGISTRATION ACT, 6 & 7 Vict. c. 18.*
- III. *Particular Points.*

- I. *Cases decided upon Statutes anterior to the REFORM ACT, 2 W. 4, c. 45.*

8 H. 6, c. 7.—*Freehold Qualification.*

One who holds in fee land parcel of a manor, which by the custom of the manor is conveyed by ordinary assurance, and without any necessity for a licence from the lord, or any enrolment, or surrender and admittance,—is a freeholder within the 8 H. 6, c. 7, although, at the time of acquiring the estate, he acknowledged to hold of the lord “by free deed, fealty, suit of court, &c.” *Passingham, App., Pitty, Resp., 299.*

- II. *Cases decided upon the Construction of the REGISTRATION ACT, 6 & 7 Vict. c. 18.*

Section 13.—Signature of Lists of Voters.

1. The 13th section of the 6 & 7 Vict.

c. 18, which requires the lists of voters prepared by the overseers to be signed by them, is in this respect directory only. *Morgan, App., Parry, Resp., 334.*

Section 74.—Right of Cestui que trust.

2. A purchaser of freehold land (sufficient in other respects to confer a qualification to vote in the election of members), to whom no conveyance has been made, and who has not been let into possession, does not acquire a right to be registered, under the 74th section of the 6 & 7 Vict. c. 18, although he has actually paid the whole purchase-money. *Anelay, App., Lewis, Resp., 316.*

Section 100.—Transmission of Notice of Objection by Post.

3. A notice of objection to a county vote was sent by post, addressed to the voter at “his place of abode as described in the list of voters:”—Held, sufficient; and that it was neither necessary nor proper to add the name of the parish or township contained in the heading of the list. *Flint, App., Sharp, Resp., 281.*

Section 101.—Form of Notice of Objection.

4. A notice of objection to a county vote was addressed "to the overseers of the parish or township of B.," without adding the county, as required by the 6 & 7 Vict. c. 18, s. 101. The notice, however, having been found to have reached the hands of the overseers before the 25th of August:—Held, that the notice and service were sufficient. *Jones, App., Innous, Resp., 290.*

5. A notice of objection to a county vote was addressed "to the overseers of the parish or township of B.," without adding the county, as required by the 6 & 7 Vict. c. 18, s. 101. The overseers having acted upon the notice,—although it did not appear when it reached their hands:—Held, that the

notice and service were sufficient; for that, in the absence of any finding to the contrary, the court would assume that the overseers had done their duty. *Godsell, App., Innous, Resp., 295.*

6. Whether an informality in the notice, or the service thereof, can be waived by the overseers,—*quære? Ib.*

III. *Particular Points.*

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END OF THE SEVENTEENTH VOLUME.

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